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LAKELAND REPORTER

Hearing on Zerwekh dam slated for December

More than 20 witnesses may be called during a three-day contested hearing next month when nearly a dozen city residents will challenge the Wisconsin Department of Natural Resources plans to issue a permit allowing Margaret Zerwekh to remove her millpond dam.

Posted: November 13, 2008

By KELLY SMITH

ksmith@jcpgroup.com

City of Delafield - More than 20 witnesses - many of them experts in science and engineering - may be called during a three-day contested hearing next month when nearly a dozen city residents will challenge the Wisconsin Department of Natural Resources (DNR) plans to issue a permit allowing Margaret Zerwekh to remove her millpond dam.

The experts and lawyers representing the citizens will argue that the department has not sufficiently studied the public health, safety, environmental, ecological, economic and aesthetic effect of removing the dam, draining the millpond, and allowing the Bark River to seek a more natural course.

The hearing is scheduled for Dec. 9-12 at the Waukesha Public Library.

DNR officials said the hearing is being held in Waukesha because the public library was the only public facility in the region with a meeting room large enough to conduct a hearing over at least a three-day period.

Zerwekh's neighbors are also expected to make a presentation to the Common Council at its Nov. 17 meeting.

Mayor Ed McAleer said he does not know what the neighbors intend to propose.

At one time, city officials had considered the possibility of attempting to purchase the land and preserve the dam and millpond. The idea was subsequently dismissed because of the anticipated costs of the land acquisition and repairing and maintaining the dam.

Department officials said that the list of witnesses scheduled to testify at the hearing could change, depending on the evidence presented.

According to the lawyers and legal documents, there will be two issues in the hearing: whether the department had the authority in June to order wooden gates in the dam removed so that water in the 12-acre pond would drain into the Bark River, and whether the department has sufficient cause to issue a permit allowing the dam to be removed.

Department officials said they ordered the drawdown because they were concerned about the stability and safety of the dam after torrential rain storms that month.

At the same time, a permit requested by Zerwekh to remove the dam was pending before the agency.

Zerwekh is seeking permission to remove the more than 170-year-old dam, which her husband purchased in the late 1940s, because she cannot afford to rebuild the dam to DNR standards.

The department has classified the dam as a "high hazard" because of the amount of property and lives that could be endangered downstream from the dam on the Bark River if the wood, steel and earthen structure failed.

More than 10 years ago, the department advised Zerwekh that she would have install a new, larger spillway in the dam.

Zerwekh has estimated the cost for the project at about a million dollars, while consultants for the city three years ago said the project could cost as much as \$800,000.

However, eight residents, all who reside along the mill pond, have argued that removal of the dam threatens their "substantial interests," including the value of their property, their right of access to the pond and their ability to use and enjoy the pond.

Furthermore, they argue, the department has failed to adequately assess the economic impact of the dam removal on the neighbors, the loss of recreational benefits that would occur to the public as a result of the dam removal, and the environmental and ecological impacts of removing the dam.

Department experts are expected to testify about the "factual issues" that existed that prompted the department to issue the drawdown order.

Other department experts are also expected to testify about how the department assessed the environmental, ecological, engineering and economic issues relating to removing the dam.

Experts for Zerwekh are expected to testify as to why and how she plans to remove the dam and how they plan to control the release of about 52,000 cubic yards of sediment at the bottom of the pond, which has a maximum depth of about five feet, according to the neighbors.

Although Zerwekh owns the dam, state law requires that she seek a permit before she can remove the dam. The permit application must describe how the dam is being removed and how environment impacts of removing the dam are being mitigated.

2008 OCT -7 PM 12:18

Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

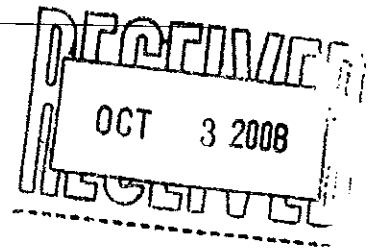
and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

REQUEST TO PERMIT ENTRY

TO: Steven D. Schmuki
Attorney at Law
Sayas, Schmuki & Plum SC
11430 W Bluemound Rd, # 200
Wauwatosa, WI 53226-4050
Attorney for



Pursuant to Wis. Stat. § 804.09, you are requested to permit entry on the following property, Nemahbin Roller Mill Dam, located on the Bark River in the NW1/4 of Section 19, Township 07 North, Range 18 East, City of Delafield, Waukesha County, for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation as detailed below.

1. The property to be inspected consists of the Roller Mill Dam structure, the spillways and/or raceways, the berm/embankment on the side of the dam structures, the impoundment area in back of the dam, and the Bark River and its bed and banks; and necessary access on the property surrounding these structures (the Site).
2. The site inspection shall allow inspection, measuring, surveying, photographing of the Site, the taking of plant, sediment and water quality samples, and testing and analysis of the integrity of the dam and its associated structures.
3. Based on the results of this inspection, Petitioners reserve the right to request follow up inspections of the Site.

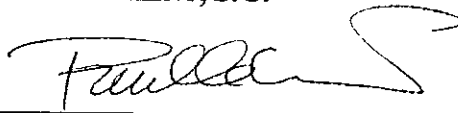
Raffi Shirikin, Lynne Olson, Gayle Gaborsky, Douglas and Joanne Prittie, Larry and Elizabeth Michels, Michael and Ann Gagliano, Alfred and Susan Wagner, Neil and Eileen Mooers (collectively "Petitioners") request that the entry and inspection occur in October 2008, at the earliest mutually agreeable time.

Service of a written response to this request is due from you in accordance with the provisions of Wis. Stat. § 804.09.

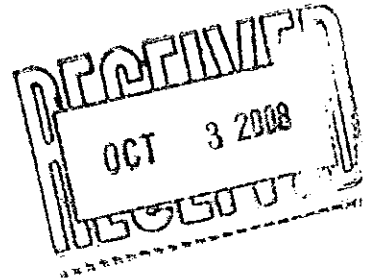
DATED this 2 day of October, 2008.

ANDERSON & KENT, S.C.

By: _____



Paul G. Kent (#1002924)
1 N. Pinckney Street, Suite 200
Madison, WI 53703
(608) 246-8500
Attorneys for Petitioners



under Wis. Stat. pursuant to Wis. Stats. § 804.12. Further, note that you are under a continuing duty to seasonably supplement your responses and to correct any incorrect responses.

In responding to the below discovery requests, you should abide and utilize the following Instructions and Definitions:

INSTRUCTIONS

1. Each Interrogatory shall be answered separately and fully in writing under oath. The answers are to be signed by the person making them.
2. Each Request for Production of Documents covers and relates to all documents in your possession, custody or control, or in the possession, custody or control of any of your directors, officers, employees, agents, servants, attorneys and assigns, predecessors or successors.
3. To the extent you contend in your response to these discovery requests that the information or documents sought is privileged or otherwise not the proper subject of a response, you must provide as complete an answer as you contend is permissible under the Wisconsin Rules of Civil Procedure.
4. For each document produced in response to an Interrogatory or Request For Production of Documents, indicate the number of the Interrogatory or Request, and the subpart thereof, to which it is responsive.
5. If anything is deleted from a document produced in response to any request, indicate the reason for the deletion and the subject matter of the deleted material.
6. If any objection is made to any Interrogatory or Request, state the basis for the objection. If you do not answer an Interrogatory or Request to produce a document because of a claim of privilege, set forth the privilege claimed, the facts upon which you rely to support the

Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

PETITIONERS FIRST SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS TO THE DEPARTMENT OF
NATURAL RESOURCES

TO: The Wisconsin Department of Natural Resources
c/o Attorney Michael Scott
WI Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Pursuant to Wis. Stats. §§ 804.08 and 804.09, Wis. Stat. §227.45 and the Division's
Prehearing Order of September 24, 2008, Petitioners, by their attorneys Anderson and Kent,
S.C., require that you respond to the below Interrogatories and Requests for Production of
Documents.

Each of the below discovery requests should be answered separately and fully, in writing,
under oath, unless objected to and in which event the objection should be expressly stated. Your
responses should be signed by you and a copy served upon the undersigned within 30 days
hereafter. Note that an evasive or incomplete answer will be deemed to be a failure to answer

claim of privilege and identify each document (by date, title, subject matters, including author, addressees and persons to whom the document was distributed) for which each such privilege is claimed.

DEFINITIONS

1. The term, "Draw Down Order" shall mean the Order dated June 18, 2008 for a drawdown of the Nemahbin Roller Mill Dam.
2. The term "Abandonment Permit" shall mean the application for dam abandonment of the Nemahbin Roller Mill Dam filed by Margaret Zerwekh.
3. The term "Department" or "DNR" shall mean the State of Wisconsin Department of Natural Resources and any of its employees or agents.
4. The term "Environmental Assessment" shall mean the environmental assessment prepared by the DNR for the abandonment of the Roller Mill Dam under cover letter dated on or about May 30, 2008.
5. The term "communication," shall mean any exchange between or among two or more human beings in which information is transferred or received regardless of the mode or means by which the information is transferred or received (e.g., meeting, telephone conference, telefax, voice mail, e-mail, drawing, etc.)
6. "Document" means the complete original (or a complete copy where the original is not available) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including but not limited to all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings, including, without limitation, all tapes

and discs, now or formerly in your possession, custody or control, including all documents as defined in the broadest sense permitted by Wis. Stat. § 804.09.

7. The phrase "electronic data" shall mean and include all originals, and all copies of any e-mail messages; any e-mail activity logs showing both incoming and outgoing items; any voice mail; and any audio or video recordings of any kind.

8. When used herein, the term "photograph" shall include any form such as, without limitation, standard or instant film, cinema, videotape and digital or other electronic means of recording.

9. The singular shall always include the plural, plural words shall always include the singular, and the present tense shall always include the past tense.

10. Gender specific words shall be understood to include both genders.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons who have provided substantive information incorporated into your responses to the below Interrogatories.

INTERROGATORY NO. 2: Identify any and all reports, studies, memoranda, or other written analysis or conclusions generated by any experts who have been listed by the DNR in its list of witnesses in this proceeding.

INTERROGATORY NO. 3: State all bases for, and identify all facts and documents which support the contention in the Findings of Fact in the Draw Down Order that, "the dam in its present condition is not sufficiently strong, and is unsafe and dangerous to life, health and property."

INTERROGATORY NO. 4: Identify which of the following elements specified in the Environmental Assessment as "elements needed for the Department to proceed with

Mrs. Zerwekh's application" for dam removal has been completed, and for each such element that has been completed the dates of completion:

- Material Removal Plan
- Erosion Control Plan
- Sediment Stabilization Plan
- Planting Plan
- Floodplain Analysis
- Stream bank Stabilization Plan
- Existing and Proposed Grades
- Construction Sequence
- Site Specific analysis.

INTERROGATORY NO. 5: For each of the elements identified in Interrogatory No. 4 that were not prepared prior to the draw down of the dam, explain the reason why the draw down proceeded without such information, whether such information is in the process of being prepared, and if so when such elements will be completed.

INTERROGATORY NO. 6: For each of the tasks in the plan elements identified in Interrogatory No. 4, that has not been fully implemented, provide the estimated costs of implementing such tasks; identify the source of funds for implementing such tasks, and the extent to which such funds will be available.

INTERROGATORY NO. 7: Identify all measures taken by the Department, if any, to stabilize the estimated 52,000 cubic yards of sediment existing within the millpond during the draw down of the dam and any studies or measurements the Department has taken concerning sediment loads down stream of the dam before and after the draw down.

INTERROGATORY NO. 8: Identify and describe any meetings held between the Department and Mrs. Zerwekh concerning the dam removal and any offers of financial assistance made by the Department to Mrs. Zerwekh to remove or draw down the dam.

INTERROGATORY NO. 9: State all bases for, and identify all facts and documents which support the statement in the Environmental Assessment that "The dam and millpond have altered, homogenized and decreased the quality of aquatic habitat with this section of the Bark River. The dam removal will allow the river to return to its natural pre-dam state, improving water quality, conditions for native aquatic species aquatic habitat and increasing biodiversity."

INTERROGATORY NO. 10: Identify the number of acres and location of the shoreland wetlands adjacent to the open water pond and Bark River upstream of the pond that will be eliminated by removal of the dam, the number of acres of wetlands whose functional values will be adversely impacted by removal of the dam, and for each such area, the types of functional values impacted; and state all bases for, and identify all facts and documents that explain how a reduction of or impact on the pond and shoreland wetlands is consistent with the requirements of NR 103.

INTERROGATORY NO. 11: Identify all other cases in which the Department has concluded that impacts to displaced wildlife (including impacts to herptiles, amphibians, mussels and turtles) from open water and wetland areas are adequately addressed by the potential of nearby habitat.

INTERROGATORY NO. 12: Identify all studies and analysis undertaken by the Department to conclude that the removal of the dam will have "no . . . economic impacts resulting from the removal of the dam," including any site specific analysis or appraisals that the DNR has undertaken.

INTERROGATORY NO. 13: State all bases for, and identify all facts and documents for the statement in the Environmental Assessment that any adverse impacts associated with this project are expected to be short-term.

INTERROGATORY NO. 14: Identify all studies, reports, data and other analysis undertaken by the Department on the location, depth and soil types of the sediment exposed after the dam draw down, the steps required to re-establish vegetation on such areas, the criteria for assessing and probability of success of such re-vegetation, and the need for and extent of measures necessary to limit incursion by invasive species in such areas.

INTERROGATORY NO. 15: State all bases for, and identify all facts and documents for the statement in the Environmental Assessment that the long term impacts on the riparian and aquatic ecosystems should be highly beneficial.

INTERROGATORY NO. 16: State all bases for, and identify all facts and documents for the statement in the Environmental Assessment that "the dam and supporting infrastructure is structurally unsound and presents a safety hazard to human health, land property and the environment should it fail."

INTERROGATORY NO. 17: State all bases for, and identify all facts and documents for the statement that "there is no cost-effective modification to the dam that would meet the state requirements for maintenance of this dam other than total reconstruction."

INTERROGATORY NO. 18: Identify all alternatives to dam reconstruction that would mitigate the alleged impacts of the dam in its current condition.

INTERROGATORY NO. 19: Identify all threatened or endangered resources studies that were undertaken as part of the Environmental Assessment or as part of the dam Draw Down Order.

INTERROGATORY NO. 20: Identify all studies, reports, analysis or other data undertaken by the Department to evaluate the wildlife, recreation, natural scenic beauty and navigational functions served by: (i) the mill pond and (ii) the Bark River upstream of the mill pond; and how those functions will be impacted by the drawdown and/or abandonment of the Roller Mill Dam.

REQUESTS FOR PRODUCTION OF DOCUMENTS


REQUEST NO. 1: Identify all persons who have provided or identified documents incorporated or which you otherwise intend to ultimately be captured into your responses to the below Requests for Production of Documents.

REQUEST NO. 2: Produce all documents related to any of the Interrogatories set forth above as well as all documents upon which you relied to formulate or otherwise respond to the preceding discovery requests including but not limited to: (i) documents prepared to address the "elements needed for the Department to proceed with Mrs. Zerwekh's application" for dam removal, (ii) any expert reports, studies, memoranda, or other written analysis or conclusions, and (iii) any other documents related to the Interrogatories set forth above.

REQUEST NO. 3: Produce any documents related to the dam's hazard ranking and the need for dam replacement or repair.

DATED this 31st day of October, 2008.

ANDERSON & KENT, S.C.

By: 
Paul G. Kent (#1002924)
1 N. Pinckney Street, Suite 200
Madison, WI 53703
(608) 246-8500
Attorneys for Defendant Petitioners



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

October 16, 2008

ALJ Jeffrey Boldt
5005 University Avenue, Suite 201
Madison, Wisconsin 53705

Attorney Steven D. Schmuki
Sayas, Schmuki & Plum, S.C.
11430 West Bluemound Road, #200
Wauwatosa, WI 53226-4050
(representing Margaret E. Zerwekh)

Attorney Paul G. Kent
Anderson & Kent, S.C.
1 North Pinckney Street, Suite 200
Madison, WI 53703
(Representing Petitioners Raffi, Shirikin, Lynne Olson and Gayle Gaborsky)

Attorney Erin Fay
3590 South Willow Glen Drive
New Berlin, WI 53151
(Representing Upper Nemahbin Lake Management District)

Richard L. Mace
1320 Pewaukee Road
Waukesha, WI 53188
(Representing Waukesha County Planning and Zoning Management)

Cynthia and Joseph Daues
537 North Cushing Park Road
Delafield, WI 53018

Subject: WDNR Witness List for the Nemahbin Roller Mill Dam Contested Case hearing, case Nos. IP-SE-2008-68-67868 and IP-SE-2008-68-67870

Dear Judge Boldt, Counsel, And Parties:

Enclosed please find the Wisconsin Department of Natural Resources Witness List for the above-entitled matter. Should you have any questions or concerns regarding this list, please contact me. (608) 266-7527. Thank you.

Michael D. Scott
Staff Attorney
Bureau of Legal Services

Enc.

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State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

WITNESS LIST OF THE DEPARTMENT OF NATURAL RESOURCES

Now comes the Department of Natural Resources, and identifies the following individuals
as potential witnesses in this matter:

1. Michelle Schneider
Water Regulation and Zoning Engineer
Wisconsin Dept. of Natural Resources
141 NW Barstow St, Room 180
Waukesha WI 53188

Ms. Schneider will testify as an expert on issues related to engineering aspects of the
drawdown order and the abandonment process, and may testify regarding factual
aspects of the situation which caused the drawdown order to be issued, her
involvement thereto, and the Nemahbin Roller Mill Dam situation in general

2. Brent Binder
Water Reg & Zoning Engineer
Wisconsin Dept. of Natural Resources
1155 Pilgrim Road
Plymouth WI 53073

Mr. Binder will testify as an expert on issues relating to the drawdown and
abandonment process, dam engineering issues in general, and factual issues regarding
the Nemahbin Roller Mill Dam

3. Susan Beyler
Fisheries Team Supervisor
Wisconsin Dept. of Natural Resources
141 NW Barstow St, Room 180
Waukesha WI 53188

Ms. Beyler will testify as an expert witness in the areas of fisheries, water quality and other biological aspects, in particular the lack of impacts or effect the drawdown and abandonment may have on navigability, fish passage, water quality, fishery and habitat; and other Public Trust issues.

4. Bill Sturtevant
Statewide Dam Safety Engineer
Wisconsin Dept. of Natural Resources
101 S Webster Street - WT/3
Madison WI 53703

Mr. Sturtevant will testify as an expert witness in the areas of dam safety, dam abandonment, removal, and restoration both in general and as they relate to this project in particular.

5. Andy Hudak
Water Reg and Zoning Specialist
Wisconsin Dept. of Natural Resources
141 NW Barstow St, Room 180
Waukesha WI 53188

Mr. Hudak will testify as an expert on water management and Public Trust issues, including but not limited to recreation, navigability, natural scenic beauty, wildlife, habitat, water quality and quantity, and will testify on factual matters as well regarding the Nemahbin Roller Mill Dam.

6. The Department reserves the right to call any witness named by the Petitioners or any other participant or party to this proceeding, including such expert witnesses which, by reason of evidence produced at hearing or by way of limited discovery, may be required as either a direct witness or in rebuttal.

7. The Department reserves the right to call any witness named on this list as a lay witness in addition to the person's expert testimony.

8. The Department reserves the right to amend or supplement this witness list and name additional expert or lay witnesses as a result of discovery or other factors.

Submitted this 16th day of October, 2008.

A handwritten signature in black ink, reading "Michael D. Scott". The signature is written in a cursive style with a horizontal line underneath the name.

Michael D. Scott
Staff Attorney
Department of Natural Resources
State Bar Number 1005380



Anderson & Kent, S.C.

Attorneys and Counselors at Law

Paul G. Kent
Constance L. Anderson
Gregory D. Murray
Alan G. B. Kim, Jr.
Anne W. Schacherl
Waltraud A. Arts, Of Counsel

email: pkent@andersonkent.com

October 17, 2008

VIA E-MAIL

Jeffrey D Boldt
Administrative Law Judge
Wisconsin - Division Of Hearings And Appeals
5005 University Avenue, Suite 201
Madison Wisconsin 550347005

RE: *In the Matter of an Application by Margaret Zerwekh to Abandon and Remove the Nemahbin Roller Mill Dam, Case No. IP-SE-2008-68-67868, and An Order for Drawdown of the Impoundment Located on the Bark River in the City of Delafield, Waukesha County, Wisconsin, Case No. IP-SE-2008-68-67870*

Dear Judge Boldt:

Enclosed please find Petitioners' Witness List in the above-referenced matter.

Very truly yours,

ANDERSON & KENT, S.C.

Paul G. Kent

PGK/mai
Enclosure

cc: Steven D. Schmuki, Esq. (via fax)
Michael D. Scott, Esq. (via e-mail)
Attorney Erin Fay (via e-mail)
Richard L. Mace (via U.S. mail)
Cynthia and Joseph Daues (via U.S. mail)

Before The
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DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
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Roller Mill Dam

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and

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Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

PETITIONERS' WITNESS LIST

Raffi Shirikin, Lynne Olson, Gayle Gaborsky, Larry and Elizabeth Michels, Michael and Ann Gagliano, Alfred and Susan Wagner, Neil and Eileen Mooers (collectively "Petitioners"), by their attorneys, Anderson & Kent, pursuant to the pre-hearing order entered in the above-captioned matter, does hereby list the following witnesses who may be called at the hearing in this matter:

1. One or more of the following Petitioners may testify
 - **Raffi Shirikin and Lynne Olson**, 740 Mill Road, Delafield, Wisconsin, 53018.
 - **Gayle Gaborsky**, 364 Bark River Court, Delafield, Wisconsin, 53018.
 - **Larry and Elizabeth Michels**, 272 Bark River Court, Delafield, Wisconsin, 53018.
 - **Michael and Ann Gagliano**, 210 Bark River Court, Delafield, Wisconsin, 53018.

- **Alfred and Susan Wagner**, 184 Bark River Court, Delafield, Wisconsin, 53018.

- **Neil and Eileen Mooers**, 257 West Main Street, Delafield, Wisconsin, 53018.

Each of the Petitioners are riparian owners on the millpond which is created by the Nemahbin Roller Mill Dam. They will testify regarding the impacts of removal of the pond on their riparian rights and the impacts on the public interest including rights of navigation, natural scenic beauty, fish and aquatic habitat and related values.

2. **Rob Montgomery**, Montgomery and Associates Resource Solutions LLC
2820 Walton Commons West, Ste 155 Madison, WI 53718.

Mr. Montgomery is a professional engineer and a principal affiliated with Montgomery and Associates Resources Solutions LLC with expertise in water resources and environmental engineering. He may testify as to matters related to Roller Mill Dam including its structural integrity, flood hazard potential, and requirements to bring the dam into compliance with state regulations, the dam's function within the Bark River system, the role the dam and millpond serves for flood storage and stormwater management, and sediment, erosion and deposition efforts in the Bark River and Lake Nemahbin associated with removal of the dam..

3. **Mark R. Ellena**, Professional Engineer, Ellena Engineering Consultants, LLC,
890 Elm Grove Road, Suite 214, Elm Grove, WI 53122

He may testify as to matters related to Roller Mill Dam including its structural integrity, flood hazard potential, and function within the Bark River system; the roll the dam and millpond serves for flood storage and stormwater management and related matters.

4. **Alice Thompson**, Thompson & Associates Wetland Services, LLC, 1514 Menomonee Ave., South Milwaukee, WI 53172.

Alice Thompson is a wetland ecologist with a Master's Degree from the University of Wisconsin-Milwaukee. She is a Professional Wetland Scientist (PWS) as certified by the Society of Wetland Sciences Certification Program and an Assured Professional Wetland Delineator as determined by the Wisconsin Department of Natural Resources. She is owner of Thompson and Associates Wetland Services, LLC and is the principal author of the Wetland Restoration Handbook for Wisconsin Landowners. She may testify regarding the wetland functional values and ecological value of the millpond, and the impacts on these values from removal of the dam both upstream and downstream; the impacts of discharge of sediment on the aquatic ecosystem downstream; issues relating to the restoration of the mill pond including vegetation and soils, and threatened and endangered species issues implicated by the dam removal.

5. **Rick Larkin**, Larkin Appraisals, Inc. 750 Wall Street, Elm Grove, WI. 53122.

Rick Larkin has 32 years of experience, he lives in Pewaukee and is very qualified with lake property and their values. He stated that the property loss would be significant but not devastating, due to the fact it was a pond not a lake.

6. **Jeffrey A. Thornton**, 321 Barney Street, Waukesha, WI 53186-2402.

He will testify about the ecology of the pond including threatened and endangered species, the issues concerning erosion and sedimentation both upstream and downstream involving the pond and the removal of the dam, and issues relating to sediment transport and hydraulics.

7. **Dr. Thomas Slawski**, W239 N1812 Rockwood Drive, Waukesha, WI 53187.

He will testify about the ecology of the pond including threatened and endangered species, the issues concerning erosion and sedimentation both upstream and downstream involving the pond and the removal of the dam, and issues relating to sediment transport and hydraulics.

8. Petitioners reserve the right to call rebuttal witnesses as needed. Petitioners reserve the right to call any witness listed by any other party to the proceeding.

9. Petitioners reserve the right to supplement this list as additional witnesses are identified through discovery. Petitioners also reserve the right to supplement this list after it has had an opportunity to inspect the dam.

Dated this 17th day of October, 2008.

ANDERSON & KENT, S.C.

By: 

Paul G. Kent (#1002924)
One N. Pinckney Street, Suite 200
Madison, WI 53703
Phone: 608-246-8500

Attorney for Petitioners

Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
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Case No. IP-SE-2008-68-67868

-and-

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Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No. IP-SE-2008-68-67870

*DISCLOSURE OF WITNESSES BY
APPLICANT, MARGARET E. ZERWEKH*


NOW COMES the applicant, Margaret E. Zerwekh, by her attorneys, Sayas, Schmuki & Plum, S.C., by Attorney Steven D. Schmuki, and hereby lists the following as witnesses to be called at the time of hearing:

1. Kevin Zeh
Zeh's Home & Ground Improvement, LLC
202 Weis Street
Allenton, Wisconsin 53002

Mr. Zeh will testify regarding his previous work on Zerwekh's dam and the cost thereof, and costs of repair necessary now.

2. Neal O'Reilly
Vice President, Water Resources Planning
Hey & Associates
240 Regency Court
Brookfield, Wisconsin 53045

Mr. O'Reilly will testify as to the environmental and water resource impacts of the removal of the dam.

- 
3. Fay U. Amerson
W270 S3565 Oak Knoll Drive
Waukesha, Wisconsin 53189

Ms. Amerson will testify as to erosion control, storm water management, watershed protection and lake management, in general.

4. Helen Sarakinos
River Alliance of Wisconsin
306 East Wilson Street; Suite #2W
Madison, Wisconsin 53703

Ms. Sarakinos will testify to advantages of dam removal in terms of environmental quality of restored river.

5. Gerald Flakas
293 Fieldstone Road
Delafield, Wisconsin 53018

Mr. Flakas will testify as to the attitude of the larger Delafield community regarding the dam.

6. Steven R. Libbey
34127 Venice Park Road
Delafield, Wisconsin 53018

Mr. Libbey will testify as to concerns over private property damage due to dam failure.

7. A representative of Rust Environment and Infrastructure, Inc.
1020 North Broadway; Suite #400
Milwaukee, Wisconsin 53202

The representative will testify as to the hydrologic, hydraulic and structural analyses of the dam.

8. A representative of Mead & Hunt
6501 Watts Road
Madison, Wisconsin 53179

The representative will testify as to the Rehabilitation Feasibility Report (2/2006).

9. A representative of Inter-fluve, Inc.
3602 Atwood Avenue
Madison, Wisconsin 53714

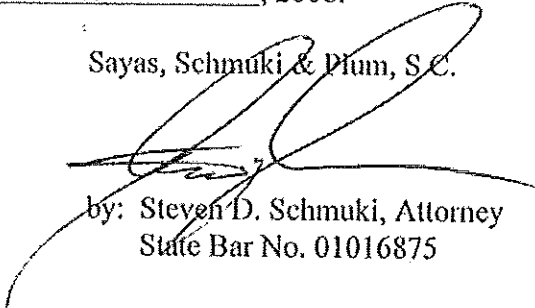
The representative will testify as to sediment volume analysis, etc., regarding dam removal.

10. Any witnesses named by the petitioners.

Applicant reserves the right to amend this list, by adding additional witnesses, pursuant to further discovery.

Dated this 17th day of October, 2008.

Sayas, Schmuki & Plum, S.C.



by: Steven D. Schmuki, Attorney
State Bar No. 01016875

P.O. Address
11430 West Bluemound Road
Suite 200
Wauwatosa, Wisconsin 53226
(414) 771-3802

Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

PETITIONERS' MOTION FOR TO AMEND THE SCHEDULING ORDER

Petitioners, by their attorneys, Anderson & Kent, hereby move to amend the scheduling order in the above captioned matter. As grounds therefore, Petitioners allege as follows:

1. Petitioners filed this contested case hearing objecting to the abandonment of the Roller Mill Dam pursuant to the provisions of Wis. Stat. § 31.185. Among other things, that section provides for a mechanism for municipalities or other persons or associations to acquire ownership of a dam where abandonment is being proposed. This section provides in part as follows:

If someone registers opposition to the abandonment at the hearing and such opposition is not withdrawn, the department shall defer action on the application for a period of 120 days after the hearing. Within a reasonable time after the expiration of such period, the department shall deny the permit, or grant the permit, subject to such conditions as it imposes under sub. (5), unless, within such 120-day period, one or more municipalities or other persons or associations have agreed to acquire ownership of the dam and have furnished satisfactory proof of intent to comply with s. 31.14 (2) or (3).



Anderson & Kent, S.C.

Attorneys and Counselors at Law

Paul G. Kent
Constance L. Anderson
Gregory D. Murray
Alan G. B. Kim, Jr.
Anne W. Schacherl
Waltraud A. Arts, Of Counsel

email: pkent@andersonkent.com

November 14, 2008

VIA E-MAIL

Jeffrey D Boldt
Administrative Law Judge
Wisconsin - Division Of Hearings And Appeals
5005 University Avenue, Suite 201
Madison Wisconsin 550347005

RE: *In the Matter of an Application by Margaret Zerwekh to Abandon and Remove the Nemahbin Roller Mill Dam, Case No. IP-SE-2008-68-67868, and An Order for Drawdown of the Impoundment Located on the Bark River in the City of Delafield, Waukesha County, Wisconsin, Case No. IP-SE-2008-68-67870*

Dear Judge Boldt:

Enclosed is Petitioners' Motion to Amend the Scheduling Order in the above-referenced matter.

Very truly yours,

ANDERSON & KENT, S.C.

Paul G. Kent

PGK/mai
Enclosure

cc: Steven D. Schmuki, Esq. (via fax)
Michael D. Scott, Esq. (via e-mail)
Attorney Erin Fay (via e-mail)
Richard L. Mace (via U.S. mail)
Cynthia and Joseph Daues (via U.S. mail)

2. Subsequent to the notice of abandonment filed by the Applicant, Petitioners have been attempting to gather the information necessary to determine whether such acquisition is financially feasible and if so the mechanisms available to effectuate acquisition through voluntary or involuntary processes.

3. Petitioners have been and continue to meet with the City of Delafield with respect to reviewing options for maintaining the Roller Mill dam.

4. Determining the financial feasibility of acquisition depends in large part on whether the existing dam can be repaired and the standards the structure would need to meet. The standards depend in part on the hazard rating of the dam and the calculation of the flood flow rate which together impact the cost of providing the required spillway capacity.

5. Petitioners have discovered that the engineering firm of Yaggy Colby Associates is in the process of finalizing a contract with several local communities to undertake a study related to the flood flow rate for the Bark River to re-examine floodplain boundaries, which will result in a Letter of Map Revision submittal to DNR and eventually to FEMA. (Yaggy Colby Study). The data from that comprehensive study will provide up to date flood flow rates which will have a direct impact on the spillway design and cost for the Roller Mill dam.

6. In addition, as a result of the request to abandon the Roller Mill dam (and a separate effort to reconstruct CTH P which could affect the hydrologic control structure at the outlet of Lower Nemahbin Lake), the Upper Nemahbin Lake Management District is conducting a planning program designed to provide specific guidance with respect to the hydrology of the Middle Bark River. The District has contracted the assistance of the Southeastern Wisconsin Regional Planning Commission (SEWRPC) to conduct of a planning

program designed to guide the proposed and planned activities within the middle Bark River so as to protect water quantity and quality in the affected Lakes. (SEWRPC Study)

7. Although access to the Roller Mill dam site was delayed until October, based on an initial analysis of the control structure and surrounding berm, engineering consultants for the Petitioners believe that the structure could be modified or repaired at relatively modest cost, depending on the calculation of the flood flow analysis and other hydraulic information.

8. The Yaggy Colby Study and SEWRPC studies are estimated to be substantially completed by spring 2009. These studies will bear directly on the issues of the feasibility of maintaining the Roller Mill dam.

9. Modifying the scheduling order to either postpone the hearing until such studies are available, or alternatively, keeping the hearing record open until such studies are available would allow information critical to the determinations required under Wis. Stat. § 31.185 to be included in this hearing record.

10. Modifying the scheduling order to allow such information to be provided will not present any public health or safety issue because the dam has already been completely drawn down. In addition, a few additional months will not work any substantial prejudice on the Applicant. The Roller Mill dam has been in existence on this site for over 150 years. Discussions between the applicant Mrs. Zerwekh and the DNR concerning dam maintenance, replacement or removal have been on-going since the mid-1980s. Taking a few more months to obtain the studies to make a reasonable determination about the future of this dam is not unreasonable.

11. There are no statutory timeframes for holding a hearing under Wis. Stat. § 31.185 that would be implicated by granting a postponement.


For the foregoing reasons Petitioner's request the following relief:

A. That the current schedule be modified to remove the current hearing dates of December 10 and 11, 2008 from the hearing calendar, and to schedule a status conference on or about March 1, 2009 to determine the availability of the Yaggy Colby and SEWRPC studies and to schedule new hearing dates.

B. In the alternative, that if the hearing scheduled for December 10 and 11 cannot be removed from the calendar, that the hearing record be kept open until the Yaggy Colby and SEWRPC Reports can be included in the record along with any associated testimony.

Dated this 14th day of November, 2008.

ANDERSON & KENT, S.C.

By: 
Paul G. Kent (#1002924)
One N. Pinckney Street, Suite 200
Madison, WI 53703
Phone: 608-246-8500

Attorney for Petitioners

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LAKELAND REPORTER

City asked to seek dam hearing's delay - Neighbors seek city help to preserve Zerwekh dam

The city might be about to get involved in a dam controversy that Mayor Ed McAleer wanted to avoid.

By KELLY SMITH

Posted: November 20, 2008

ksmith@jcpgroup.com

City of Delafield - The city might be about to get involved in a dam controversy that Mayor Ed McAleer wanted to avoid.

The Common Council will decide Dec. 1 whether to ask an administrative law judge to delay a hearing on a proposed permit by the Department of Natural Resources (DNR) that would allow Margaret Zerwekh to remove the dam she owns on the Bark River near Main Street and Mill Road.

A lawyer for about a dozen neighbors who live along the millpond created by the dam asked the council Monday night to request the delay so more research on the environmental effects of removing the dam could be conducted, and the neighbors could have more time to attempt to acquire the dam from Zerwekh so it could be rebuilt and maintained rather than removed.

The hearing is scheduled for Dec. 10-12 at the Waukesha Public Library.

The neighbors are challenging the DNR's authority to issue the permit, arguing that the agency has not done sufficient environmental studies or taken into consideration the property rights of the landowners along the pond.

McAleer told a reporter two weeks ago that he thought the city should stay out of the controversy involving the state agency, the neighbors and Zerwekh.

However, after hearing a presentation to the council by the neighbors' lawyer and environmental consultant, McAleer instructed City Attorney James Hammes to draft a letter for the council's consideration that would request a delay in the hearing.

"It is a decision that has to be made by the council," McAleer said after the meeting when asked why he was now willing to involve the city in the controversy.

About three years ago, city officials expressed an interest in trying to preserve and maintain the dam, including a resolution passed by the council authorizing the staff to try to negotiate the purchase of the dam from Zerwekh.

The idea was dropped after city consultants issued a report that it could cost as much as \$800,000 to rebuild the dam.

The estimate did not include the costs of acquiring the dam and pond on about 12 acres owned by Zerwekh.

Zerwekh asked for permission to remove the dam because, she said, she could not afford to rebuild it, a project she estimated would cost about a million dollars.

However, an environmental engineer hired by the neighbors told the council Monday night that the costs for rebuilding the dam might be lower than anticipated.

In addition, Rob Montgomery of Montgomery and Associates Resources Solutions of Madison added that the dam and millpond have provided recreational, aesthetic, ecological and environmental benefits to the community.

He said there has been ecological and environmental damage to the millpond neighborhood as a result of the DNR's decision in July to remove some of the stop logs in the dam and allow the pond to slowly drain.

He said the drawdown and removal of the dam would endanger some aquatic species included on the DNR's endangered species or "special concerns" list.

He also argued that the drawdown is producing other ecological damage, as well as increasing the amount of sediment downstream in the Nemahbin lakes.

He said dam abandonment projects are often environmentally risky and expensive, and he suggested restoration of the dam might be a better alternative.

There was no mention during the council meeting of how either the neighbors or city officials could convince Zerwekh to sell the dam or how the costs of rebuilding and maintaining the dam would be paid.



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY Access via relay - 711

November 21, 2008

ALJ Jeffrey Boldt
5005 University Avenue, Suite 201
Madison, Wisconsin 53705

Attorney Steven D. Schmuki
Sayas, Schmuki & Plum, S.C.
11430 West Bluemound Road, #200
Wauwatosa, WI 53226-4050
(representing Margaret E. Zerwekh)

Attorney Paul G. Kent
Anderson & Kent, S.C.
1 North Pinckney Street, Suite 200
Madison, WI 53703
(Representing Petitioners Raffi, Shirikin, Lynne Olson and Gayle Gaborsky)

Richard L. Mace
1320 Pewaukee Road
Waukesha, WI 53188
(Representing Waukesha County Planning and Zoning Management)

Cynthia and Joseph Daues
537 North Cushing Park Road
Delafield, WI 53018

Subject: WDNR Response to Petitioners' Motion to Amend the Scheduling Order for the Nemahbin Roller Mill Dam Contested Case hearing, case Nos. IP-SE-2008-68-67868 and IP-SE-2008-68-67870

Dear Judge Boldt, Counsel, And Parties:

On November 14, 2008, Atty Kent submitted a Motion to Amend the Scheduling Order for the Nemahbin Roller Mill Dam Contested Case hearing, in essence requesting a delay of the proceedings until March of 2009. The Department is opposed to this motion; we did not submit a response, assuming that a hearing on the motion would be forthcoming. However, since no hearing has yet been scheduled, the Department is compelled to submit a written response. We still assume that a hearing will be scheduled and stress that time is of the essence in that regard.

The Department's position is that the Nemahbin Roller Mill Dam Contested Case Hearing continue as scheduled. The Department believes that postponing the hearing until after March of 2009 is not necessary and is outweighed by the interests of the public and the dam owner. The dam is currently in a deteriorating condition and is not code compliant. The dam is therefore unsafe and poses a threat to public health and

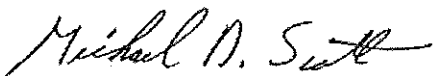
safety. It is owned by Mrs. Zerwekh, a private individual, and she is solely liable for any damages. Postponing the hearing on Mrs. Zerwekh's dam abandonment application is unfair to her. Mrs. Zerwekh is currently under an order to bring her dam into compliance by December of this year, 2008.

Attorney Kent's letter requesting an amended schedule discusses a Yaggy Colby study which will reexamine floodplain boundaries on the Bark River (#5 and #8). The Petitioners may argue the approval of the abandonment should be based on the potential cost of bringing the dam into compliance. However, it is axiomatic that the current owner of the dam is not interested in reconstructing the dam and has applied for a permit to abandon and remove the structure. The Department looks at abandonment as a method for bringing the dam into compliance and will review Mrs. Zerwekh's application on its merits. Additionally, based on the fact that the consultant reportedly conducting the analysis was not under contract to perform the analysis as of November 18, 2008, would bring into question the ability for this analysis to be completed, approved, and effectively utilized to design a code compliant dam by the extension date. The Department asserts that it is inappropriate to indefinitely delay acting on the application in question and force the dam owner to carry the liability of a non-code compliant dam.

Postponing the hearing to wait for design documents for the County Highway P project would raise similar concerns. It should be emphasized and well understood that the Department is not reviewing Mrs. Zerwekh's application with respect to it being the best or only alternative to compliance. The Department will review the application put forth by the dam owner as her desired method for code compliance and its merits as related to the Public Trust Doctrine and environmental regulation.

To summarize, the Petitioners have not provided any compelling reasons, basis, or rationale for extending the hearing. For these reasons, the Department feels the Petitioners' request is without merit and the hearing should continue as planned on December 10-12.

We looked forward to presenting these arguments at the motion hearing, wherever it is scheduled. Thank you.



Michael D. Scott
Staff Attorney
Bureau of Legal Services

cc:

Michelle Schneider, SER - Waukesha
James D' Antuono, SER - Waukesha
Erin Fay, Esq. (Representing UNLMD)



Anderson & Kent, S.C.

Attorneys and Counselors at Law

Paul G. Kent
Constance L. Anderson
Gregory D. Murray
Anne W. Schacherl
Waltraud A. Arts, Of Counsel

email: pkent@andersonkent.com

November 25, 2008

VIA E-MAIL

Jeffrey D Boldt
Administrative Law Judge
Wisconsin Division Of Hearings And Appeals
5005 University Avenue, Suite 201
Madison Wisconsin 550347005

RE: *In the Matter of an Application by Margaret Zerwekh to Abandon and Remove the Nemahbin Roller Mill Dam, Case No. IP-SE-2008-68-67868, and An Order for Drawdown of the Impoundment Located on the Bark River in the City of Delafield, Waukesha County, Wisconsin, Case No. IP-SE-2008-68-67870 Motion to Modify Hearing Schedule*

Dear Judge Boldt:

This letter is in response to your email on Friday, November 21, 2008 and the responses filed by the parties opposing the above motion. Before addressing the information which we believe constitutes "good cause" for purposes of Wis. Admin. Code chs NR 2 and HA 1, I would like to briefly clarify several points.

1. Rescheduling Of A Few Months Imposes No Threat To Public Safety.

Although both the DNR and the Applicant have asserted that the dam is unsafe and subjects the Applicant to liability, such assertions ignore two undisputed facts. **First, the dam is completely drawn down; all of the stop logs have been removed. There is no head of water to threaten the safety of anyone.** Second, even before the stop logs were taken out, under the severe flood conditions in June 2008, the dam and the spillway embankment held.

Yes, there are repairs that need to be made to the dam, and the *mill race* area by the Applicant's house should be abandoned. But, given the current status of the dam, there is no imminent safety or liability concern.

November 25, 2008

Page 2

2. Petitioners Are Actively Working With The City To Determine Whether There Are Ways To Acquire The Dam Under The Provisions Of Wis. Stat. §31.185(4).

As the Applicant acknowledges, Petitioners are working with the City to repair and restore the dam. Most recently, Petitioners made a presentation to the City Council on Monday, November 17, 2008, requesting a letter of support for delaying this hearing to allow time to work with the City. Under City Council procedures, that request will be acted on at its next meeting on December 1, 2008, and a favorable response is anticipated.

Even if Applicant's unsubstantiated assertion about the City's reluctance to spend tax dollars is correct, the City has a variety of options for funding the dam other than tax dollars including the creation of special assessment districts under Wis. Stat. § 31.38. In short, at this time it is premature to say that the only option to bring the dam into compliance is for the Applicant to do so.

3. Good Cause Exists For Rescheduling The Hearing Because The SEWRPC Study Directly Relates To The Issues In The Hearing.

Petitioners agree with the DNR that the issue for the hearing is solely whether the proposed abandonment meets the provisions of Wis. Stat. § 31.185. As the Division has noted in several prior decisions, the legal standard for dam abandonment focuses on public rights in navigable waters, and the protection of life, health and property.

The SEWRPC study under contract with the Upper Nemahbin Lake Management District directly relates to those issues. The SEWRPC study on the hydrology of the Middle Bark River includes analysis of the transport of sediment from the pond to areas downstream of the Roller Mill Dam and its impact on various species of concern and threatened species. The study is directly relevant to public rights concerns and any conditions the Division would impose on a proposed abandonment. That information should be available before, not after abandonment decision is made. As a practical matter, particularly in times of tight budgets, it simply makes good sense for government agencies to coordinate on data gathering.

4. Good Cause Also Exists For Rescheduling Based On The Yaggy Colby Study.

Petitioners also agree with the DNR that the types of repairs required for the dam to bring the dam into compliance and cost of repair to bring the dam into compliance are not issues to be determined in this hearing.

However, the purpose of the 120-day period in Section 31.185 was a type of redemption period to allow other responsible parties to acquire existing dams. Thus, while this study does not relate to the standards for abandonment, it does relate to the redemption period. The types of repairs and cost of repairs relates to the ability of the Petitioners to reach an agreement on the feasibility of acquiring the dam. If information on flood flows, which is critical to determine whether to

Anderson & Kent, S.C.

November 25, 2008

Page 3

repair and restore the dam, is not available until the 120-day period has nearly or completely expired, then the purpose of the statute will be thwarted.

CONCLUSION

Petitioners are merely requesting that the hearing be rescheduled or kept open a few additional months for completion of these important studies that are due this spring. The dam that withheld last spring's flood is now completely drawn down so there is no danger or liability to anyone by accommodating this request. This matter has been the subject of discussions for more than a decade. Surely waiting a few more months to get the best information available only makes sense.

We respectfully submit that these two studies should be available before this hearing is concluded and as such constitutes good cause for rescheduling of the hearing. Should the Division be willing to grant this request, we agree to bear the cost of a second publication.

Very truly yours,

ANDERSON & KENT, S.C.



Paul G. Kent

PGK/mai

cc: Steven D. Schmuki, Esq. (via e-mail)
Michael D. Scott, Esq. (via e-mail)
Attorney Erin Fay (via e-mail)
Cynthia and Joseph Dauer (via e-mail)
Richard L. Mace (via U.S. mail)

Schneider, Michelle M - DNR

From: Scott, Michael D - DNR
Sent: Wednesday, November 26, 2008 1:18 PM
To: Schneider, Michelle M - DNR
Subject: FW: Roller Mill Dam Complete E-mail List; Motion Info
Attachments: 2008-11-25 PGK Ltr to Judge Boldt.pdf

Here is Kent's 11/25 e-mail and letter. I responded shortly after. I'll forward that, too.

From: Paul Kent [mailto:pkent@andersonkent.com]
Sent: Tuesday, November 25, 2008 3:02 PM
To: Boldt, Jeffrey - DOA; Steven D. Schmuki
Cc: Scott, Michael D - DNR; rizzo2601@earthlink.net; Erin Fay
Subject: RE: Roller Mill Dam Complete E-mail List; Motion Info

Judge Boldt,

Thank you for tracking down the email list. Attached is a short letter on behalf of the Petitioners on our motion for a modification of the schedule in this matter.

In today's mail I also received for the first time a notice from Mr. Scott dated last Friday seeking to add Don Reed as an expert witness to address wetland issues. It is hard to imagine why wetlands were not adequately considered and evaluated when the original witness list was prepared well over a month ago. Wetlands issues are not a new consideration, they have been an obvious issue from the beginning. Where is the good cause for *this* request. Moreover, adding this witness at this stage is prejudicial for at least two reasons. First, discovery closes Friday and there will be no opportunity to ask questions of this witness as we have with DNR's other witnesses through interrogatories and document requests. Moreover, it would be very prejudicial to introduce a witness from SEWRPC on wetlands while simultaneously excluding the SEWRPC study on the Bark River we are attempting to introduce. For these reasons we object to adding this witness. If the hearing is rescheduled per our request, we would then have time to address this witness and would withdraw our objection.

Thank you for your consideration of these matters.

cc: Richard L. Mace (via U.S. mail)

Paul G. Kent
Anderson & Kent, S.C.
1 N. Pinckney Street, Suite 200
Madison, WI 53703
(608) 246-8500 Telephone
(608) 246-8511 Fax
pkent@andersonkent.com

PRIVILEGE AND CONFIDENTIALITY NOTICE

This electronic mail is intended for the named recipient only. This electronic mail may contain privileged and confidential information and, therefore, should not be disclosed to third parties without our express permission. If you have received this electronic mail in error, please notify me immediately and purge the electronic mail from your system. Thank you.

From: Boldt, Jeffrey - DOA [mailto:jeffrey.boldt@wisconsin.gov]
Sent: Tuesday, November 25, 2008 9:29 AM
To: 'Steven D. Schmuki'
Cc: Paul Kent; Scott, Michael D - DNR; 'rizzo2601@earthlink.net'; 'Erin Fay'

Subject: Roller Mill Dam Complete E-mail List; Motion Info

Dear Parties and Interested Persons:

Here are copies of two e-mails received and a complete e-mail list. I have now heard from all parties relating to the Motion to Adjourn.

Please try to get me any additional submittals relative to the motion by **3:30 pm today**, and I will issue a Ruling on the motion tomorrow.

Sincerely,

Jeff Boldt, ALJ

From: Steven D. Schmuki [mailto:schmuki@execpc.com]
Sent: Friday, November 21, 2008 3:47 PM
To: Boldt, Jeffrey - DOA
Subject: Roller Mill Dam

Dear Judge Boldt,

My e-mail address is schmuki@execpc.com. My fax number is (414) 771-3802. I'm not sure why I did not get those to you earlier.

Steve

-----Original Message-----

From: Joseph Dauer [mailto:rizzo2601@earthlink.net]
Sent: Tuesday, November 25, 2008 8:24 AM
To: DHA Mail
Subject: Roller Mill Dam

Dear Judge Boldt,

Our main concern with the Roller Mill Dam situation is that something be done to prevent harm for the residents down stream and for thier water conditions to be restored. We used to live in Summit and have river access. The water is now so full of muck that it is not navigable. The bait and boat rental business that has been there since 1952 stands to suffer from this situation being unresolved.

Thank You, Joseph and Cynthia Dauer 262-719-7278



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

RULING ON MOTION TO POSTPONE CONTESTED CASE HEARING

On November 14, 2008, the named petitioners represented by Attorney Paul Kent filed a Motion to Amend the Scheduling Order in the above-captioned matter. (Kent petitioners) On November 21, 2008, the Department of Natural Resources (DNR) filed an objection to the Motion. Also on November 21, 2008, the Division of Hearings and Appeals requested that any other responses to the Motion be filed by Tuesday, November 25, 2008. Ms. Zerwekh subsequently filed an objection to the Motion as well on November 21, 2008. Further, both the Kent petitioners and the DNR filed responses on November 25, 2008.

The Motion requested two alternative forms of relief: a) that the hearing set forth December 10-12, 2008, be adjourned and that a conference call be put on for a status conference in March, 2009; or b) that if the hearing was not rescheduled, that the record be left open until reports from Yaggy Colby and Southeastern Wisconsin Regional Planning Commission (SEWRPC) can be included.

In its Motion, the petitioners set forth their grounds for the proposed adjournment. The petitioners have become aware that the engineering firm of Yaggy Colby Associates "is in the process of finalizing a contract with several local communities to undertake a study related to the flood flow rate for the Bark River to examine flood plain boundaries, which will result in a letter of map revision submittal to the DNR and eventually FEMA." Further, that the data from the study will provide flow rate information "which will have a direct impact on the spillway design and cost for the Roller Mill dam. (Id.)

Secondly, the petitioners made reference to contracting for a SEWRPC planning program "designed to provide specific guidance with respect to the hydrology of the Middle Bark River." (Id.)

The petitioners assert that these two studies will be substantially completed by the spring of 2009. Further, that the Kent petitioners "believe that the structure could be modified or

repaired at relatively modest cost, depending upon the calculation of the flood flow analysis and other hydraulic information.”

The Kent petitioners therefore seek to delay the hearing until some time in the spring of 2009. They note the 120 day deferral period after the hearing is complete as set forth in Wis. Stat. § 31.185.

The DNR vigorously opposes the Motion, as does Ms. Zerwekh. The DNR argues as follows:

The dam . . . “is owned by Mrs. Zerwekh, a private individual, and she is solely liable for any damages. Postponing the hearing on Mrs. Zerwekh’s dam abandonment application is unfair to her. Mrs. Zerwekh is currently under an order to bring her dam into compliance by December of this year, 2008.

Attorney Kent’s letter requesting an amended schedule discusses a Yaggy Colby study which will reexamine floodplain boundaries on the Bark River (#5 and #8). The Petitioners may argue the approval of the abandonment should be based on the potential cost of bringing the dam into compliance. However, it is axiomatic that the current owner of the dam is not interested in reconstructing the dam and has applied for a permit to abandon and remove the structure. The Department looks at abandonment as a method for bringing the dam into compliance and will review Mrs. Zerwekh’s application on its merits. Additionally, based on the fact that the consultant reportedly conducting the analysis was not under contract to perform the analysis as of November 18, 2008, would bring into question the ability for this analysis to be completed, approved, and effectively utilized to design a code compliant dam by the extension date. The Department asserts that it is inappropriate to indefinitely delay acting on the application in question and force the dam owner to carry the liability of a non-code compliant dam.” (DNR brief, p. 2)

Mrs. Zerwekh agrees and argues further:

Petitioners now suggest that a possible new study of the flood flow rates and associated flood plain boundaries for the Bark River may be undertaken for several location communities by the Engineering firm Yaggy Colby, and that the results of such study may produce information that may allow reduction of the size of the spillway capacity of the dam. No such study has been formally contracted for as of this date. At this time, results of any such study are speculative at best. Waiting for the same places as undue burden on Applicant, viz a vis her liability for any dam failure which, based on the information actually available, presents a high hazard. (Zerwekh, p. 2)

The Kent petitioners replied on November 25, 2008. They noted again that the dam has been drawn down, the stop logs removed and that there is no head of water that poses an imminent threat to public safety. They also indicated that they are in talks with the City to repair and restore the dam. Further, the City might well formally agree with the request to postpone the dam at its next meeting on December 1, 2008.

Finally, the Kent petitioners re-stated two separate grounds for a finding that there is good cause to adjourn the hearing. First, they argue that the SEWRPC study directly relates to the public rights issues in the hearing. Secondly, they argue that the Yaggy Colby study, and flood flow rate information in particular, is relevant to determine "whether to repair and restore the dam."

A hearing that has been properly noticed may be adjourned only for "good cause." Wis. Admin. Code NR 2.09(2) Further, a request to adjourn a hearing "received after a required newspaper publication may be rescheduled only if the person requesting the change bears the cost of republication of the notice and the administrative law judge deems the change appropriate under the circumstances presented." Wis. Admin. Code NR 2.09(1) Given the objections of the other parties, the Division does not find sufficient "good cause" to postpone the hearing under "the circumstances presented."

First, there has been no showing that the "flow rate information" and other hydrological data could not have been obtained by other means by the Kent petitioners. While a long term study of flow rates may be in the works, this case was first Noticed on August 13, 2008 and has been on the calendar since September 15, 2008. Certainly some information relative to these issues could have been obtained over the four months that this matter has been pending. It is true that the applicant at first denied entry to the Kent petitioners, but the request to enter the property was granted almost as soon as the denial was made known to the Division in October, 2008. It is also likely true that a long-term formal study may offer better data than the series of flow-rate "snapshots" that could have been acquired as this matter was pending. However, there has been no such a showing--nor even a showing that the Kent petitioners have made reasonable efforts to obtain similar information before the long-scheduled hearing takes place.

Second, at least one of the studies does appear to be only hypothetical at this point—apparently no contract has been finalized for the Yaggy Colby study. Given this fact, it is hard to argue that the possibility of such a study could be good cause to delay a pending hearing. It is also hard to know with certainty the scope or timing of such a possibility.

Third, the Department and Ms. Zerwekh are both correct that the undue burden of any postponement would fall primarily on Ms. Zerwekh, who opposes the request to adjourn the hearing.

The Motion to adjourn is denied. However, the Division will leave open the issue of whether an extension of the 120 day deferral period is appropriate until after the

hearing record is made. The Kent petitioners can try to make a record as to why the decision deferral period should be extended.

Finally, a dispute has arisen relating to the DNR's request to amend its witness list to include Dr. Don Reed of SEWRPC to address wetland issues. The Kent petitioners argue that it would be prejudicial to allow Dr. Reed to testify but to exclude the pending SEWRPC study on the Bark River. This issue can be argued at hearing in connection with the disputed issue as to whether the record can be held open longer than the statutory 120 day period. But it is not a basis to exclude Dr. Reed's testimony. However, there is a question of the pending date to close discovery and whether it would be unfair to the Kent petitioners to add Dr. Reed without allowing them to seek some discovery relating to Dr. Reed's testimony. To remedy this problem, the Division believes it appropriate to extend the discovery deadline to allow the Kent petitioners to do some discovery.

Accordingly, the Scheduling Order is Amended to allow discovery solely related to Dr. Reed's testimony to continue until December 8, 2008. Further, **if Mr. Kent submits a written discovery request by December 1, 2008, Dr. Reed shall make his best effort to answer the same by December 8th, 2008.** (As a courtesy, the ALJ is e-mailing a copy of this ruling to give Dr. Reed maximum notice of this possibility.)

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the Motion to Adjourn the Hearing be denied;

IT IS FURTHER ORDERED, that the Division withholds any ruling on whether or not to extend the deferral time period after the hearing to allow submittal of any new data from the studies described above.

IT IS FURTHER ORDERED, that the Scheduling Order is Amended to allow discovery solely related to Dr. Reed's testimony to continue until December 8, 2008. Further, if Mr. Kent submits a written discovery request by December 1, 2008, Dr. Reed shall make his best effort to answer the same by December 8th, 2008.

Dated at Madison, Wisconsin on November 26, 2008.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

Jeffrey D. Boldt
Administrative Law Judge

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of an Application by Margaret
Zervekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

**RESPONSE OF THE DEPARTMENT OF NATURAL RESOURCES
TO PETITIONERS' FIRST SET OF INTERROGATORIES AND
REQUEST FOR PRODUCTION OF DOCUMENTS**

GENERAL OBJECTION: The Department objects to the definitions and instructions to the extent they seek to impose obligations that are inconsistent with or in addition to those set forth in the Wisconsin Statutes.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons who have provided substantive information incorporated into your responses to the below Interrogatories.

RESPONSE:

- a. Michelle Schneider
Water Regulation and Zoning Engineer
Wisconsin Department of Natural Resources
141 NW Barstow St., Room 180
Waukesha, WI 53188
- b. Brent Binder
Water Reg. & Zoning Engineer
Wisconsin Department of Natural Resources
1155 Pilgrim Road
Plymouth, WI 53073

- c. Susan Beyler
Fisheries Team Supervisor
Wisconsin Department of Natural Resources
141 NW Barstow St., Room 180
Waukesha, WI 53188
-
- d. Bill Sturtevant
Statewide Dam Safety Engineer
Wisconsin Department of Natural Resources
101 S. Webster St.
Madison, WI 53703
- e. Andrew Hudak
Water Reg. and Zoning Specialist
Wisconsin Department of Natural Resources
141 NW Barstow St., Room 180
Waukesha, WI 53188
- f. James D'Antuono
Basin Supervisor
Wisconsin Department of Natural Resources
141 NW Barstow St.
Waukesha, WI 53188
- g. Heidi Bunk
Lakes Biologist
Wisconsin Department of Natural Resources
141 NW Barstow St.
Waukesha, WI 53188
- h. Donald Reed
Chief Biologist
Southeastern Wisconsin Regional Planning Commission
W239 N1812 Rockwood Drive
PO Box 1607
Waukesha, Wisconsin 53187-1607
- i. Jennifer Schank
Legal Intern
Wisconsin Department of Natural Resources
101 S. Webster St.
Madison, WI 53707

j. Brian Glenzinski
Wildlife Biologist
Wisconsin Department of Natural Resources
141 NW Barstow St.
Waukesha, WI 53188

k. Bob Hay
Conservation Biologist
Wisconsin Department of Natural Resources
101 S. Webster St.
Madison, WI 53707

INTERROGATORY NO. 2: Identify any and all reports, studies, memoranda, or other written analysis or conclusions generated by any experts who have been listed by the DNR in its list of witnesses in this proceeding.

RESPONSE: The DNR objects to this Interrogatory on the grounds that the request for production of "any and all reports, studies, memoranda, or other written analysis or conclusions generated by any experts who have been listed by the DNR in its list of witnesses" is vague and overly broad, in that DNR's expert witnesses have generated hundreds of such analyses and conclusions over the course of their careers. Subject to the objection, analyses and conclusions with respect to the Nemahbin Dam issue can be found on the following website, which includes the Nemahbin File and the Environmental Assessment:

<http://dnr.wi.gov/org/water/wm/dsfm/flood/nemahbinrollermill/>

INTERROGATORY NO. 3: State all bases for, and identify all facts and documents which support the contention in the Findings of Fact in the Draw Down Order that, "the dam in its present condition is not sufficiently strong, and is unsafe and dangerous to life, health and property."

RESPONSE: Evidence that the dam is not sufficiently strong, and is unsafe and dangerous to life, health and property may be found in the DNR inspection report from 1994 which lists deficiencies and corrective measures needed. Additionally, pictures of the dam taken in June of 2008 illustrate the failed mill race gate, deteriorated mill race concrete, and deteriorated I-beams and concrete in principal spillway. Further, a 1998 Order from the Department requires the dam to be upgraded to meet spillway capacity requirements by December 2008, and a Dam Failure Analysis has determined the dam to be a deficient High Hazard dam.

INTERROGATORY NO. 4: Identify which of the following elements specified in the Environmental Assessment as "elements needed for the Department to proceed with Mrs. Zerwekh's application" for dam removal has been completed, and for each such element that has been completed the dates of completion:

- Material Removal Plan
- Erosion Control Plan
- Sediment Stabilization Plan
- Planting Plan
- Floodplain Analysis
- Stream bank Stabilization Plan
- Existing and Proposed Grades
- Construction Sequence
- Site Specific analysis.

RESPONSE: The Department objects on the grounds that the Environmental Assessment is not part of the contested case hearing and that any issues raised with respect to the Environmental Assessment should not be construed as such. In addition, the Department notes that the definition of "Environmental Assessment" is for a draft version of the assessment, not the final version, and objects in that regard as well. These objections should be considered standing for all other interrogatories in which information about the Environmental Assessment has been sought. Subject to the objections, none of the previous elements have been completed except the existing and proposed grades. The Department has the 30% complete plans for the removal project which include the existing and proposed grades. The Department received the plans October 24, 2008.

INTERROGATORY NO. 5: For each of the elements identified in Interrogatory No. 4 that were not prepared prior to the draw down of the dam, explain the reason why the draw down proceeded without such information, whether such information is in the process of being prepared, and if so when such elements will be completed.

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, the draw down proceeded because it was a draw down performed under the authority of sec. 31.02, Stats. to protect public safety. The Department does not know whether information/elements are in the process of being prepared, nor when Mrs. Zerwekh will complete the elements.

INTERROGATORY NO. 6: For each of the tasks in the plan elements identified in Interrogatory No. 4, that has not been fully implemented, provide the estimated costs of implementing such tasks; identify the source of funds for implementing such tasks, and the extent to which such funds will be available.

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, the Department is not responsible for providing the estimated costs and source of funds. It is Mrs. Zerwekh's responsibility to determine final cost funding.

INTERROGATORY NO. 7: Identify all measures taken by the Department, if any, to stabilize the estimated 52,000 cubic yards of sediment existing within the millpond during the draw down of the dam and any studies or measurements the Department has taken concerning sediment loads down stream of the dam before and after the draw down.

RESPONSE: The Department exercised a slow drawn down to stabilize existing sediment. Additionally, the Department seeded the sediment with wet prairie seed mix and winter wheat after the draw down. After the draw down, no studies or measurements have occurred.

INTERROGATORY NO. 8: Identify and describe any meetings held between the Department and Mrs. Zerwekh concerning the dam removal and any offers of financial assistance made by the Department to Mrs. Zerwekh to remove or draw down the dam.

RESPONSE: The Department objects to this Interrogatory on the grounds that it is vague and overly broad. The Department has had hundreds of contacts of various durations and discussions with Mrs. Zerwekh and can not identify individual meetings. Additionally, "meeting" is not defined in this context. In regards to financial assistance, the Department has not offered Mrs. Zerwekh any financial assistance to remove or draw down the dam.

INTERROGATORY NO. 9: State all bases for, and identify all facts and documents which support the statement in the Environmental Assessment that "The dam and millpond have altered, homogenized and decreased the quality of aquatic habitat with this section of the Bark River. The dam removal will allow the river to return to its natural pre-dam state, improving water quality, conditions for native aquatic species aquatic habitat and increasing biodiversity."

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, the bases for, facts, and documents can be found in the attachments referenced in the Environmental Assessment.

INTERROGATORY NO. 10: Identify the number of acres and location of the shoreland wetlands adjacent to the open water pond and Bark River upstream of the pond that will be eliminated by removal of the dam, the number of acres of wetlands whose functional values will be adversely impacted by removal of the dam, and for each such area, the types of functional values impacted; and state all bases for, and identify all facts

and documents that explain how a reduction of or impact on the pond and shoreland wetlands is consistent with the requirements of NR 103.

RESPONSE: The Department objects to this Interrogatory on the grounds that it asserts facts not in evidence. The Interrogatory assumes wetlands will be lost or “eliminated” and that functional values will be adversely impacted. However, the Department believes that a net increase in wetlands could occur, and that most if not all of the impoundment area will eventually revert back to wetlands. Moreover, wetland functional values should not be adversely impacted if the dam were removed.

INTERROGATORY NO. 11: Identify all other cases in which the Department has concluded that impacts to displaced wildlife (including impacts to herptiles, amphibians, mussels and turtles) from open water and wetland areas are adequately addressed by the potential of nearby habitat.

RESPONSE: The Department objects to this Interrogatory on the grounds that it is vague, confusing, and over broad. It does not define “adequately addressed” nor whether the “displacement” is caused by a natural or artificial disruption, and it is difficult to understand, in particular from a relevancy standpoint. Moreover, it makes an assumption that the conclusion in the Interrogatory has been made in other places. Subject to the objection, while we cannot identify particular “cases” where the Department has made the stated conclusions, it is well understood that animals can and often do migrate to nearby habitat, whether they are displaced or not.

INTERROGATORY NO. 12: Identify all studies and analysis undertaken by the Department to conclude that the removal of the dam will have "no . . . economic impacts resulting from the removal of the dam," including any site specific analysis or appraisals that the DNR has undertaken.

RESPONSE: The Department objects on the grounds that the Interrogatory is vague and unclear. Assuming it is referring to the Environmental Assessment, we also raise the same objection as stated in our response to Interrogatory number 4, in particular as it references a draft version of the EA. Subject to the objection, the Environmental Assessment no longer states, "no...economic impacts resulting from the removal of the dam." The updated Environmental Assessment now reads "The Department of Natural Resources has not conducted any studies regarding economic impacts with dam removal projects."

INTERROGATORY NO. 13: State all bases for, and identify all facts and documents for the statement in the Environmental Assessment that any adverse impacts associated with this project are expected to be short-term.

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, the bases for, facts and documents can be found in the attachments referenced in the Environmental Assessment.

INTERROGATORY NO. 14: Identify all studies, reports, data and other analysis undertaken by the Department on the location, depth and soil types of the sediment exposed after the dam draw down, the steps required to re-establish vegetation on such

areas, the criteria for assessing and probability of success of such re-vegetation, and the need for and extent of measures necessary to limit incursion by invasive species in such areas.

RESPONSE: The Department has not conducted any sediment studies after the dam drawdown. Mrs. Zerwekh is required to submit along with her dam removal application a re-vegetation plan. We will evaluate the plan when received and the probability for success can be assessed at that time. The Department has not done any studies with respect to invasives at the Nemahbin Dam site. See also our response to Interrogatory number 7.

INTERROGATORY NO. 15: State all bases for, and identify all facts and documents for the statement in the Environmental Assessment that the long term impacts on the riparian and aquatic ecosystems should be highly beneficial.

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, the bases for, facts and documents can be found in the attachments referenced in the Environmental Assessment.

INTERROGATORY NO. 16: State all bases for, and identify all facts and documents for the statement in the Environmental Assessment that "the dam and supporting infrastructure is structurally unsound and presents a safety hazard to human health, land property and the environment should it fail."

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, the dam has a “high hazard” rating according to the Dam Failure Analysis. A “high hazard” rating means a probable loss of life if the dam were to fail (NR 333.06 (1) (c)).

INTERROGATORY NO.17: State all bases for, and identify all facts and documents for the statement that "there is no cost-effective modification to the dam that would meet the state requirements for maintenance of this dam other than total reconstruction."

RESPONSE: The Department objects to this Interrogatory on the grounds that it is vague and confusing. Assuming it is referring to the Environmental Assessment, the Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. Subject to the objection, it is Department’s belief that foundation, spillway, and embankment work would be needed to bring the dam into compliance, and would be considered a reconstruction. The costs of doing a reconstruction would be substantial. Information regarding costs for dam reconstruction alternatives may be found in the Mead & Hunt “Rehabilitation Feasibility Report.”

INTERROGATORY NO. 18: Identify all alternatives to dam reconstruction that would mitigate the alleged impacts of the dam in its current condition.

RESPONSE: The Department objects to this Interrogatory on the grounds it is vague and confusing. The Department does not understand what information the Interrogatory intends to retrieve because two interpretations to it exist; one interpretation

suggests “dam reconstruction scenarios” and the other suggests “options to dam reconstruction.” , Further, the Interrogatory fails to define “current condition.”

Subject to the objection, the Department’s responsibilities include the review and approval of dam reconstructions and repairs. The Department does not design dam reconstruction plans. Information regarding dam reconstruction alternatives may be found in the Mead & Hunt “Rehabilitation Feasibility Report.”

INTERROGATORY NO. 19: Identify all threatened or endangered resources studies that were undertaken as part of the Environmental Assessment or as part of the dam Draw Down Order.

RESPONSE: The Department objects to this Interrogatory pursuant to the response for Interrogatory no. 4. In regards to the Draw Down Order, no studies have been done by the Department because it was a safety draw down. SEWRPC conducted studies on the threatened and endangered resources (related to abandonment, not drawdown) which can be found in the Environmental Assessment.

INTERROGATORY NO. 20: Identify all studies, reports, analysis or other data undertaken by the Department to evaluate the wildlife, recreation, natural scenic beauty and navigational functions served by: (i) the mill pond and (ii) the Bark River upstream of the mill pond; and how those functions will be impacted by the drawdown and/or abandonment of the Roller Mill Dam.

RESPONSE: The Environmental Assessment has been prepared to address the Public Interest concerns relating to the abandonment; wildlife is covered under the general Public Interest concerns. The Department recently conducted a fish survey. No reports were generated for the draw down as it was ordered for safety reasons.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Identify all persons who have provided or identified documents incorporated or which you otherwise intend to ultimately be captured into your responses to the below Requests for Production of Documents.

RESPONSE:

a. Michelle Schneider
Water Regulation and Zoning Engineer
Wisconsin Department of Natural Resources
141 NW Barstow St., Room 180
Waukesha, WI 53188

REQUEST NO. 2: Produce all documents related to any of the Interrogatories set forth above as well as all documents upon which you relied to formulate or otherwise respond to the preceding discovery requests including but not limited to: (i) documents prepared to address the "elements needed for the Department to proceed with Mrs. Zerwekh's application" for dam removal, (ii) any expert reports, studies, memoranda, or other written analysis or conclusions, and (iii) any other documents related to the Interrogatories set forth above.

RESPONSE: Attachments:

1. Mead & Hunt Feasibility Report
2. Dam Failure Analysis Approval Letter

3. All of the other previously mentioned documents can be accessed on the following website, which includes the Nemahbin File and the Environmental

Assessment: <http://dnr.wi.gov/org/water/wm/dsfm/flood/nemahbinrollermill/>

REQUEST NO. 3: Produce any documents related to the dam's hazard ranking and the need for dam replacement or repair.

RESPONSE: Attachment: 1998 DNR approval letter of the analysis

AS TO OBJECTIONS

Dated this ____ day of December, 2008

Wisconsin Department of Natural Resources

Michael D. Scott
Staff Attorney
State Bar # 1005380

AS TO RESPONSES:

Dated this _____ day of December, 2008.

Michelle Schneider

Brent Binder

Bill Sturtevant

Andrew Hudak

()

()

Discovery Questions for Don Reed

Interrogatories

1. Please identify the times you have been at the Roller Mill dam, the Roller Mill dam pond and the Middle Bark River upstream and downstream of the Roller Mill dam. For each such time, describe the areas that you observed and the purpose or scope of the site visit.
2. Do you have any opinions concerning the location of the wetland boundaries around the Roller Mill Dam pond: (a) prior to the drawdown of the dam, (b) at the current time, or (c) if the dam is removed, following removal. If so what are those opinions and what is the basis for those opinions.
3. Do you have any opinions concerning the wetland functional values of the wetlands around the Roller Mill Dam pond: (a) prior to the drawdown of the dam, (b) at the current time, and (c) if the dam is removed, following removal. If so what are those opinions and what is the basis for those opinions.
4. Do you have an opinion whether the amount of wetland acres and functional values of the wetland around the Roller Mill Dam pond will be impacted if the Roller Mill dam is removed. If so what is that opinion and what is the basis for that opinion.
5. If the Roller Mill dam is removed, do you have an opinion whether portions of the area formerly occupied by the pond will become wetland. If so, identify such areas or the aggregate amount of such areas and the functional values those wetlands will have. State the basis for your opinion.
6. Have you evaluated the soil and sediment in the area formerly occupied by the pond? If so have you formed any opinions about whether the soil types can support wetland vegetation? If so what is that opinion and what is the basis for that opinion.
7. Have you evaluated the impact of the removal of the Roller Mill dam on the wetlands on the shore of the Bark River upstream and downstream of the Roller Mill dam pond? If so what conclusions have you reached concerning such impacts.
8. Do you have an opinion whether a wetland restoration or remediation plan for wetland areas impacted by a removal of the Roller Mill dam should be developed and implemented to maintain current wetland functional values? If so what is that opinion and what is the basis for that opinion.
9. If a wetland restoration and/or remediation plan should be developed do you have an opinion as to the nature of such restoration and remediation plans, the cost of developing and implementing such a plan and the availability of funding for such work? If so what are those opinions and what is the basis for those opinions.

Document Request

1. Produce any notes, correspondence or reports with respect to any expert opinions you have reached related to any of the foregoing questions or related to any other aspect of the Roller Mill dam and the potential removal of the dam.

2. Please produce any field notes, wetland delineation forms, soil sample results, vegetation surveys, threatened or endangered species surveys from any site visits identified in response to question #1.

CRAMER, MULTHAUF & HAMMES, LLP
ATTORNEYS AT LAW

James W. Hammes

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REVIEWED

By Gina C. Gresch, MMC/WCMC at 11:41 am, Apr 03, 2009

April 3, 2009

VIA E-MAIL

tschuenke@ci.delafield.wi.us

City Administrator
Tim Schuenke
500 Genesee Street
Delafield, WI 53018

Re: Nemahbin Roller Mill Dam

Dear Tim:

I have reviewed Phil Cosson's memo of April 2, 2009, regarding the funding options for the Nemahbin.

As Mr. Cosson notes in his memo, the City's exposure and risk is greatest if the City were to issue GO Bonds or Notes.

I would also note, however, that issuance of special assessment bonds does not necessarily relieve the City of liability for payment of those bonds in the event of a default by the property owner. While the County has followed the practice of reimbursing municipalities for unpaid assessments placed on the tax roll, the County is not required to follow that practice or procedure. Thus, if the City were to adopt this funding option, the Council should be aware that reimbursement by the County, in the event of a default by the property owners, is not guaranteed.

The remaining two options, those being financing through a utility or lake district involve a lesser risk on the part of the City. However, as Mr. Cosson notes, these types of funding options are not common, and under the circumstances, may not be viable funding options.

In addition to the financing options, then, the Council must consider and resolve the following issues:

1. Should a lake district be created, and if so, what would be the proposed boundaries of that district? Specifically, would the lake district include the City owned Cushing Park? If any

City Administrator
April 3, 2009
Page 2

of the private property owners whose properties are proposed to be included in the lake district object to being a part of the lake district will those properties be excluded?

The answer to these issues is important because they have a direct impact on the financing options.

2. Is the Council willing to proceed with the necessary property rights by exercising the powers of eminent domain. At this point, based upon the information provided to the City, it does not appear that the property owner is willing to convey, either outright or by easement, the necessary property rights that would be needed in order to rehabilitate the Roller Mill Dam. The only way of acquiring those rights, then, would be by the exercise of eminent domain powers. Either the City of Delafield, or the lake district, would be required to exercise the powers of eminent domain in order to acquire those property rights.

If you have any questions regarding these options, or the factors which the Council needs to consider, please give me a call.

Very truly yours,

/s/ James W. Hammes

James W. Hammes

JWH:blr

cc: Gina Gresch

Memo



To: City Council, City of Delafield
From: Philip Cosson, Ehlers & Associates, Inc.
CC: Timothy Schuenke, Administrator
Date: 4/2/2009
Re: Funding Options for the Nemahbin Roller Mill Pond Dam

At the request of the Mayor, we are providing this summary of the financing options available to the City and/or property owners affected by the Roller Mill Pond Dam. This memorandum is only meant to answer questions regarding the financing options available and will not address the merits of abandonment or reconstruction of the dam. The typical financing approaches used for this type of project are as follows:

General Obligation Bonds or Notes Issued By the City: This would be the least expensive method of financing the project. The City would issue a GO Bond/Note for the project and levy an assessment against the affected properties as security for the debt payments. While this option would allow for local control the project would count against the City's borrowing capacity. The risk to the City is that any shortfall in assessment revenue would be secured and paid through the City's levy;

Special Assessment B Bonds: These assessment bonds would be issued by the City as well. However, the payment for the bonds is exclusively the assessment revenue without the City pledging levy support if revenues are inadequate. Interest rates for this type of financing would be between .25 and .50 basis points higher than a GO Bonds/Note. Issuance expenses tend to be greater than with a GO Bond/Note and a reserve fund of 10% of the par amount of the bonds would be required as additional security for the bond purchaser. While the complexity and cost is greater for this option, the City's exposure will be reduced;

Utility District Financing: Under this financing option, the City would need to create a utility district. Once created, the City could levy a tax which would be used to make the debt payment for the project. This type of financing is used sparingly in the State of Wisconsin. As such, the cost to undertake this type of financing and the interest rate received would greatly depend on the bond purchasers' understanding of the financing vehicle and the related security. Since the security is a tax levied on the affected property, the City would have little risk; and

Lake District Financing: If the City decided to create a Lake District, (see Attorney Hammes letter dated March 12th), the Lake District could borrow for the project under Section 67.01 33.23, 33.235, or 33.24. Like the Utility District financing this method of financing is not common. The City has little risk under this type of financing because the Lake District issues the debt and secures the loan with either a levy or assessments. The costs and interest rate received for this type of financing would again be subject to the bond purchasers' understanding of the project and related security.

If the City is to finance the project through the issuance of a GO Bond/Note, or through B Bonds, a lake district may not be required. The City's exposure and risk is greatest under a GO Bond/Note, which would be the least expensive option. Conversely, the Lake District financing option has the least amount of risk to the City but may be the most costly option. For your consideration, we have prepared and attached a sample assessment based upon a \$750K project which is amortized over 20 years at 4.75%.

City of Delafield

\$750,000 Proposed Special Assessment Bonds

Year Due	Principal	Est Rates	Interest	Total	Cost per Property (7)
2010	\$35,000	4.75%	\$35,625	\$70,625	\$10,089
2011	\$35,000	4.75%	\$33,963	\$68,963	\$9,852
2012	\$35,000	4.75%	\$32,300	\$67,300	\$9,614
2013	\$35,000	4.75%	\$30,638	\$65,638	\$9,377
2014	\$35,000	4.75%	\$28,975	\$63,975	\$9,139
2015	\$35,000	4.75%	\$27,313	\$62,313	\$8,902
2016	\$35,000	4.75%	\$25,650	\$60,650	\$8,664
2017	\$35,000	4.75%	\$23,988	\$58,988	\$8,427
2018	\$35,000	4.75%	\$22,325	\$57,325	\$8,189
2019	\$35,000	4.75%	\$20,663	\$55,663	\$7,952
2020	\$40,000	4.75%	\$19,000	\$59,000	\$8,429
2021	\$40,000	4.75%	\$17,100	\$57,100	\$8,157
2022	\$40,000	4.75%	\$15,200	\$55,200	\$7,886
2023	\$40,000	4.75%	\$13,300	\$53,300	\$7,614
2024	\$40,000	4.75%	\$11,400	\$51,400	\$7,343
2025	\$40,000	4.75%	\$9,500	\$49,500	\$7,071
2026	\$40,000	4.75%	\$7,600	\$47,600	\$6,800
2027	\$40,000	4.75%	\$5,700	\$45,700	\$6,529
2028	\$40,000	4.75%	\$3,800	\$43,800	\$6,257
2029	\$40,000	4.75%	\$1,900	\$41,900	\$5,986
Total	\$750,000		\$385,938	\$1,135,938	\$162,277

OAKTON AVENUE LAW OFFICES, S.C.

Daniel P. Fay
Court Commissioner
Licensed to practice in
53072
Wisconsin & Alaska
2726

Mark P. Powers
Licensed to practice in
Wisconsin

200 Oakton Avenue
Pewaukee, Wisconsin

Phone: (262) 691-

Vicki L. Kiedrowski
Paralegal

April 6, 2009

Honorable Jeffrey D. Boldt
Administrative Law Judge
State of Wisconsin—Division of Hearings and Appeals
5005 University Avenue, Suite 201
Madison, WI 53705

RE: Roller Mill Dam
Case No.: IP-SE-2008-68-67868
Case No.: IP-SE-2008-68-67870

Dear Judge Boldt:

Please be advised, I have been retained to represent Cynthia and Joseph Dauer. Mr. and Mrs. Dauer are the owners of 537 N. Cushing Park Road, Delafield, Wisconsin. They are the owners of a substantial portion of the south shore of the Mill Pond.

First, I would like my appearance entered in the above-entitled matter. Second, my client has had an opportunity to review Mayor Ed McAleer's request on behalf of the City of Delafield for a postponement of your decision regarding the abandonment of the Rolling Mill Dam. It is my clients' position that your decision should be issued immediately. In particular, there should be no postponement of your decision based upon a request by the City of Delafield.

It is my clients' position that there has been enough uncertainty with regard to this decision.

Very truly yours,

OAKTON AVENUE LAW OFFICES, S.C.

Daniel P. Fay
DPF/lm

City Of Delafield Common Council

April 6, 2009

Roller Mill Lake District Agenda

- Public Comments From The Floor?
- Value Of the Easement For Dam Operation
- Public Interest: Pro/Con Rebuild vs. Abandonment.
- Municipal Code: Dam Owner needs a development agreement with the city in order to remove the dam.
- How Does Abandonment Impact City.
- Who Holds Dam Owners responsibilities for abandonment
- Resolution

RESOLUTION NO. 2009-06

A RESOLUTION AUTHORIZING, CREATING, AND ESTABLISHING THE ROLLER MILL LAKE DISTRICT TO TAKE CONTROL OF THE ROLLER MILL DAM AND FOR THE ROLLER MILL LAKE DISTRICT TO PROCEED WITH THE ACTIVITIES TO RESTORE THE DAM

WHEREAS, the City of Delafield recognizes that the restoration of the Roller Mill Dam is important to protect Wisconsin's resources and will promote the public welfare of the City; and

WHEREAS, the City of Delafield encompasses within its boundaries all the frontage of the impoundment created by the Roller Mill Dam, which is a public inland lake pursuant to Wis. Stat. 33.01(8); and,

WHEREAS, the City of Delafield Common Council hereby establishes a lake district under Wis. Stat. §33.23 which will include all the bordering properties of the Roller Mill Dam Impoundment, and will file all the necessary documents to form the Roller Mill Lake District; and,

WHEREAS, the City of Delafield shall exercise the necessary authority through the Roller Mill Lake District to obtain control over the Roller Mill Dam and to construct any necessary easement(s) over the land upon which the Roller Mill Dam is situated; and,

WHEREAS, the City of Delafield shall exercise the necessary authority through the Roller Mill Lake District to repair or reconstruct the Roller Mill Dam and associated structures as necessary to meet the standards of the Wisconsin Department of Natural Resources (DNR); and,

WHEREAS, the City of Delafield hereby resolves to issue a Bond up to \$700,000 to the Roller Mill Lake District for the costs associated with effectuating this resolution and that the City will assess the Roller Mill Lake District for bond reimbursement; and,

WHEREAS, upon completion of the dam in accordance with DNR standards, the City of Delafield will accept a dedication of the dam from the Roller Mill Lake District and thereafter will control, maintain and operate the dam.

IT IS, THEREFORE RESOLVED THAT:

1. The City of Delafield Common Council hereby establishes the Roller Mill Lake District ("Lake District") under Wis. Stat. §33.23 (1);

2. The Lake District boundaries will include all the properties within the City of Delafield which border or abut the Roller Mill Dam Impoundment, and which Lake District boundaries are more specifically set forth in Exhibit A, which is expressly incorporated herein by reference;

3. The City of Delafield Common Council finds that the creation of the Lake District is necessary, that it will promote the public health, comfort, convenience, and welfare, and the all properties included within the Lake District will be benefitted by the establishment of the Lake District;

4. Pursuant to Wis. Stats. § 33.23(1), the City of Delafield Common Council shall perform the function of the Lake District board of Commissioners;

5. The City of Delafield Common Council authorizes the issuance of a Bond as set forth above, and agrees to undertake the necessary actions to effectuate the provisions of this resolution;

6. Pursuant to Wis. Stat. 33.22(3)-(4), the City of Delafield Common Council authorizes and consents to the Lake District exercising town sanitary district powers under Wis. Stats. §§ 60.77 and 60.78.

BE IT FURTHER RESOLVED THAT The City of Delafield hereby authorizes the City Administrator to act on the behalf of the Roller Mill Lake District and the City of Delafield to submit an application, sign documents, and take any and all necessary action to undertake, direct, and complete activities as set forth herein, including but not limited to filing and recording the appropriate documents with the Register of Deeds and the Wisconsin DNR.

Adopted this 6th day of April, 2009.

CITY OF DELAFIELD

Ed McAleer, Mayor

ATTEST:

Gina C. Gresch, MMC/WCPC
City of Delafield Clerk-Treasurer
Waukesha County

Schneider, Michelle M - DNR

From: Scott, Michael D - DNR
Sent: Monday, April 06, 2009 3:38 PM
To: Schneider, Michelle M - DNR; Sturtevant, William - DNR
Cc: Sarakinos, Helen
Subject: FW: Dam And River Visit Plan For April 7th
Attachments: RE: Request To Visit The Dam and River; RE: Request To Visit The Dam and River; RE: Request To Visit The Dam and River; RE: Request To Visit The Dam and River

From: Neil Mooers [mailto:nmooers@wi.rr.com]
Sent: Thursday, April 02, 2009 11:11 PM
To: Boldt, Jeffrey - DOA
Cc: rizzo2601@earthlink.net; Scott, Michael D - DNR; 'Erin Fay'; 'Steven D. Schmuki'; tmentkowski@wi.rr.com; dmace@waukeshacounty.gov; 'Raffi'; Kent, Paul; emcaleer@ci.delafield.wi.us; 'Kent Brooks'; 'Steven Libbey'; 'Bill Barthel'
Subject: Dam And River Visit Plan For April 7th

Dear Judge Boldt and all parties:

All parties have agreed to meet on Tuesday April 7th at 2:00pm. The confirmation email from each party are attached. After speaking or emailing to each party, here is the walk around plan.

1. The forecast is for cold and wet weather so dress appropriately. I would recommend blue jeans and either boots or older shoes. Some of the land may be wet or soggy. As Attorney Scott suggested, we will do it rain or shine. So raincoats may be advisable also. Check the forecast.
2. Given the weather, plan to move from point to point via car. I recommend each party plan to ride in a single car so it reduces traffic. There is adequate parking in each location on the road or in driveways.
3. The stop points in order are:
 - a. Gayle Gaborsky 364 Bark River Ct – Upstream on North side. (Park on the street)
 - b. Steve Libbey 34127 Venice PARK Road – Downstream on the North side of the river. (Park on street or driveway)
 - c. Kent Brooks 34306 Venice BEACH Rd - Downstream on the South side of the river. (Park on street or driveway)
 - d. Neil & Eileen Mooers 257 W Main St. – Upstream on South side (Park in drive)
 - e. Margaret Zerwehk 500 Mill Road – Dam owner. (Park in circle drive off Main)
4. If the weather is difficult and we need to meet after the tour, we can pick a home then.
5. My guess is we can get through this in 2 hours if we move quickly and orderly. We will start immediately at 2:00 from Gayles. I will be coming from Chicago so if I am late. Raffi will begin the tour for me.

Parties Attending:

Judge Boldt

DNR:

Attorney Michael Scott
Bill Sturtevant – Dam Safety Engineer
Michelle Schneider – Dam Safety Engineer
*See Note Below.

Dam Owner:

Attorney Steve Schmuki
Margaret Zerwekh – Property Owner

Upstream Neighbors:
Raffi – Property Owner
Neil Mooers – Property Owner

Downstream Neighbors:
Bill Barthel – UNLMD Water Quality Chairman

City Of Delafield
Mayor Ed McAleer
Alderman Gerald MacDougall (I had a verbal on this one.)

PLEASE NOTE: Attorney Michael Scott has also requested that Helen Sarakinos from the River Alliance attend. I am strongly objecting to a party being added to the visit that nobody upstream of the dam has spoken to, meet or heard speak. Helen is a complete unknown to us and she is not a party to the contested case hearing. We request that Judge Boldt deny this individual on the visit. Attorney Scott also stated to me that, if the River Alliance is denied that then the City of Delafield and SEWRPAC should be denied. With regard to the City Of Delafield, I find it rather odd that the governing municipality for the dam and the upstream property owners are requested not to attend. This is within the city boundaries. The City is the governing authority that represents both the dam owner and the residents. With regard to defending SEWRPAC participating, this would be the call of the UNLMD and they have not indicated that SEWRPAC will attend. I will defer this to the UNLMD team represented by Bill Barthel in this visit.

Also, the number of email can easily get out of control in a situation like this so I propose that each party feel free to offer one reply to this email and then let the judge draw his conclusion with a response sometime on Monday. I hope this is acceptable to all.

Thank you all. Organizing this was easier than I had expected. If you have questions, my cell is listed below. I will be in Chicago Saturday through Tuesday and may not have access to email. If you have to email, copy Raffi and he will call my cell. See you on Tuesday.

Neil Mooers
257 W Main St.
Delafield, WI 53018
262-443-7971

Neil D. Mooers
Cell: 262-443-7971
nmooers@wi.rr.com

From: Scott, Michael D - DNR [<mailto:Michael.Scott@Wisconsin.gov>]
Sent: Wednesday, March 25, 2009 3:44 PM
To: Boldt, Jeffrey - DOA; 'Neil Mooers'
Cc: rizzo2601@earthlink.net; 'Erin Fay'; 'Steven D. Schmuki'; tmentkowski@wi.rr.com; dmace@waukeshacounty.gov; 'Raffi'; Kent, Paul; emcaleer@ci.delafield.wi.us
Subject: RE: Request To Visit The Dam and River

Judge Boldt,

The DNR has no objections to having a site visit. However, it is axiomatic that the logistics for this visit do not in any way delay or otherwise impede your April 10th decision. Since all parties must be present or represented for this visit (unless they decline to attend), it may not be doable for everyone on the 7th or 8th; If the site visit cannot take place prior to April 10, then the DNR would object to having the visit take place at any point after that. The

visit should also be rain or shine; no delays for inclement weather.

In addition, Mr. Mooers, since you are coordinating best times and dates, the DNR would prefer a site visit on April 7th, in the morning. 10 AM would work best. April 8th would be OK; again, 10 AM. If the times don't work, please contact me.

Michael D. Scott

~Attorney, Bureau of Legal Services

Wisconsin Department of Natural Resources

(☎) phone: (608) 266-7527

(☎) fax: (608) 266-6983

(✉) e-mail: Michael.Scott@Wisconsin.Gov

From: Boldt, Jeffrey - DOA

Sent: Wednesday, March 25, 2009 9:26 AM

To: 'Neil Mooers'; Kent, Paul; emcaleer@ci.delafield.wi.us

Cc: Scott, Michael D - DNR; rizzo2601@earthlink.net; 'Erin Fay'; 'Steven D. Schmuki'; tmentkowski@wi.rr.com; dmace@waukeshacounty.gov; 'Raffi'

Subject: RE: Request To Visit The Dam and River

Dear Parties and Interested Persons:

The only days I have completely available between now and April 10th are: **April 7th and 8th.**

Frankly, I had hoped to work on writing decisions on those days, but I am willing to meet on either date (prefer afternoon) if there is no objection and if the parties can agree to a time. Typically, we would leave it up to the person making the request to arrange a time that works for all.

I don't need to get every e-mail as you try to find a time that works—**please just include me only if you object or if you want to be present and can't be available on either April 7th or 8th.**

Sincerely,

Jeffrey Boldt, ALJ

From: Neil Mooers [<mailto:nmooers@wi.rr.com>]

Sent: Tuesday, March 24, 2009 9:35 PM

To: Boldt, Jeffrey - DOA; Kent, Paul; emcaleer@ci.delafield.wi.us

Cc: Scott, Michael D - DNR; rizzo2601@earthlink.net; 'Erin Fay'; 'Steven D. Schmuki'; tmentkowski@wi.rr.com; dmace@waukeshacounty.gov; 'Raffi'

Subject: Request To Visit The Dam and River

Hello Judge Boldt;

I am not sure if this is necessary but I would like to make sure that this request is presented properly. Please let me know if I should take a different approach.

The property owners upstream of the Nemahbin Roller Mill Dam would like to formally request that you visit the site being addressed by the hearing. We feel it adds a great deal of value to see the condition of the

dam and the river both upstream and downstream of the dam. Having the snow cover melted now gives a more complete view of the conditions.

If there are additional steps to take in setting this up, please let us know and we will take those steps.

Thank you for your consideration of this request.

Neil

Neil D. Mooers
257 W Main St.
Delafield, WI 53018
Cell: 262-443-7971
nmooers@wi.rr.com

From: Neil Mooers [mailto:nmooers@wi.rr.com]
Sent: Tuesday, March 24, 2009 12:40 PM
To: 'Boldt, Jeffrey - DOA'; 'Kent, Paul'; 'emcaleer@ci.delafield.wi.us'
Cc: 'Scott, Michael D - DNR'; 'rizzo2601@earthlink.net'; 'Erin Fay'; 'Steven D. Schmuki'; 'tmentkowski@wi.rr.com'; 'dmace@waukeshacounty.gov'; 'Raffi'
Subject: RE: Roller Mill Dam Hearing Exs. Follow up #1

Dear Judge Boldt and all other parties,

I apologize for not following your typical protocol. If I miss any others, please speak up. As for this error, I will not make it again,

Thank you,
Neil

Neil D. Mooers
Cell: 262-443-7971
nmooers@wi.rr.com

From: Boldt, Jeffrey - DOA [mailto:jeffrey.boldt@wisconsin.gov]
Sent: Tuesday, March 24, 2009 10:00 AM
To: Kent, Paul; 'emcaleer@ci.delafield.wi.us'
Cc: Scott, Michael D - DNR; rizzo2601@earthlink.net; Erin Fay; Steven D. Schmuki; tmentkowski@wi.rr.com; dmace@waukeshacounty.gov; Raffi; 'nmooers@wi.rr.com'
Subject: RE: Roller Mill Dam Hearing Exs. Follow up #1

Dear Parties:

I have received **two more (apparently) ex-parte contacts**.

Attached is a letter received on March 20, 2009 from Ms. Zerwekh, apparently sent in response to Mayor McAleer's letter.

Also, the e-mail below was apparently sent to me but not copied as well.

PLEASE REMEMBER THAT ANY LETTER OR EMAIL SENT TO THE DIVISION MUST BE COPIED TO ALL parties on this list.

The statute allows 10 days for a reply to any ex parte contact, but this will not extend the deadline for

making this decision.

Sincerely,

Jeffrey D. Boldt, ALJ

Hello Judge Boldt,

I hope you are well and enjoying the warmer spring weather. During the December contested case hearing for the Nemahbin Roller Mill Dam, you indicated that you would visit the site and properties. Now that the winter snow is gone, we would like to have you come and see the situation with your own eyes. Can you provide a time that will work for you to visit?

Thank you and enjoy your day,
Neil

Neil D. Mooers
257 W Main St.
Delafield, WI 53018
Cell: 262-443-7971
nmooers@wi.rr.com



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Dam neighbors may get help

Officials concerned about loss of property values

By KELLY SMITH

Posted: Apr. 15, 2009 12:06 p.m.

City of Delafield – City officials want to try to protect the property values of neighbors living along Margaret Zerwekh's former millpond, and an executive for the River Alliance of Wisconsin says the not-for-profit group might try to help the city.

Alliance river restoration expert Helen Sarakinos said there might be private foundation and government grant money available to help restore the river in a manner that would help protect both the river and the neighbors' property values.

Mayor Ed McAleer said the Common Council would insist on a thorough public review before any local funds were spent on a river restoration project.

McAleer said the city might be willing to vacate its control of a strip of land that is separating some of the neighbors from access to the river frontage.

The eight homeowners have warned state and city officials that removing the pond has left them without access to water frontage, which could result in a loss of hundreds of thousands of dollars in appraised value for their property.

The loss of property value could result in thousands, perhaps tens of thousands, of lost city tax base, they said.

The millpond was drained last summer by orders of the Wisconsin Department of Natural Resources because the agency was concerned about the stability of the 150-year-old millpond dam that was damaged by flooding.

State Administrative Law Judge Jeffrey Boldt appears likely to decide within a few weeks whether the state Department of Natural Resources can allow Zerwekh to remove her dam.

Boldt declined during an interview Monday to say whether he expects to issue a ruling in late April or early May.

He did say that because of state laws and administrative rules, he cannot issue a ruling before April 20.

Sarakinos has said that until Boldt approves the dam removal she cannot discuss in detail what role the river alliance may play in dam removal and river restoration.

The alliance is a not-for-profit organization interested in the preservation and protection of rivers.

High-ranking state sources have said privately that Sarakinos might be a key player in putting together the financial package of state and private grants that pays for removing the dam and restoring the river.


Alderman Gerald MacDougall said he hoped that local and state officials, along with the neighbors and the River Alliance, could work together to help the local property values.

"There are different perspectives. The pond people want the dam to stay. Margaret and the river alliance want the dam removed. Once the judge makes his decisions, it would be counterproductive if everyone didn't work together in an effort that is best for the pond people and the city," MacDougall said.

MacDougall, the representatives of the eight homeowners, along with DNR officials and Sarakinos joined Boldt for a tour of the dam, millpond and Bark River last week.

Sarakinos was observed chatting privately with the homeowners as well as city officials.

She later said it was the first time she experienced waterfront property owners possibly losing their access to a river as a result of a proposed dam removal.

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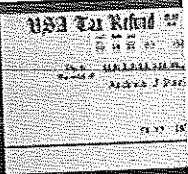


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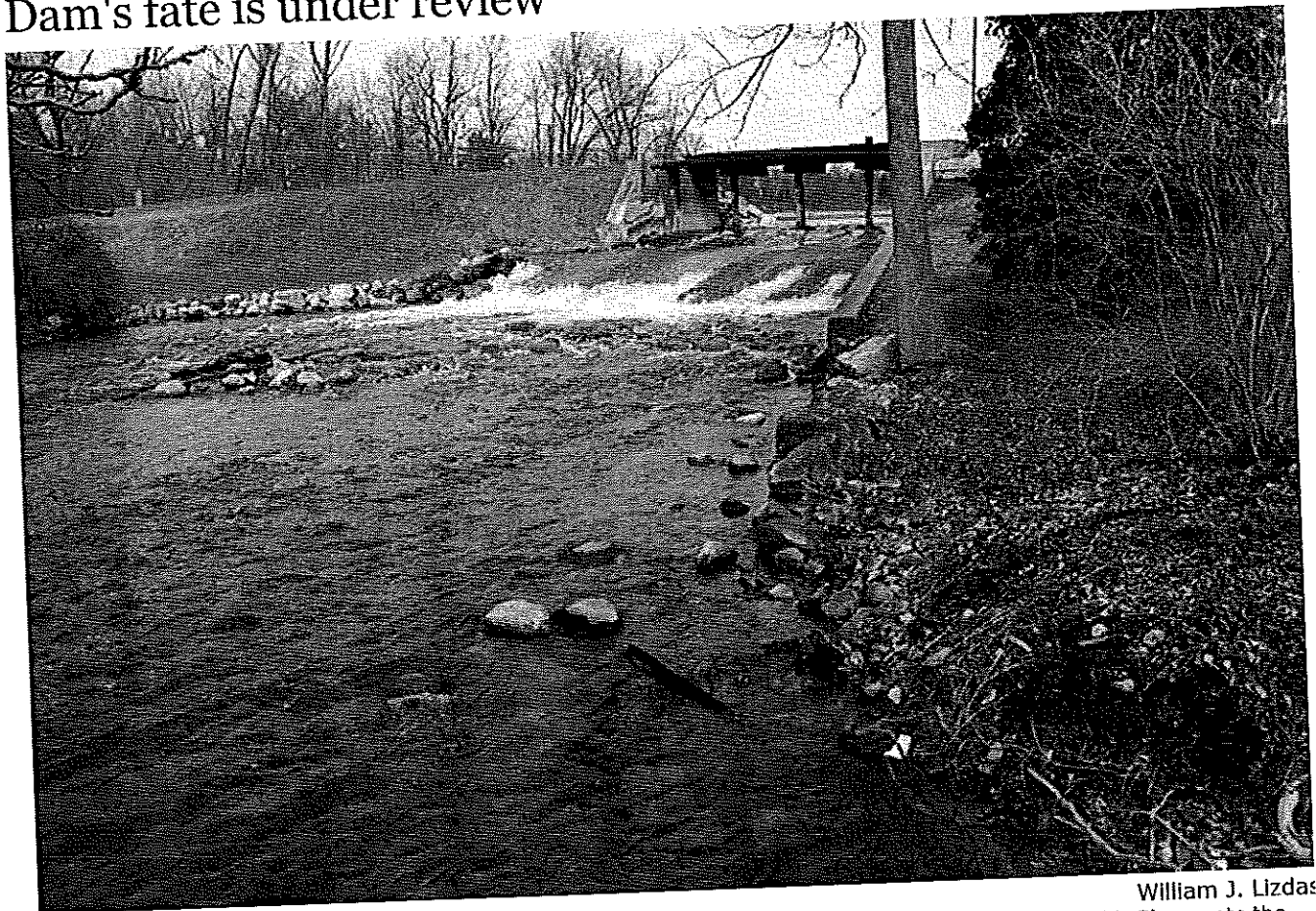
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Dam's fate is under review



William J. Lizdas

The Bark River flows through what's left of Margaret Zerwekh's dam, which is more than 150 years old. She wants the dam removed, but some nearby residents want it rebuilt. An administrative law judge is reviewing the matter for the state Department of Natural Resources.

Decision expected soon on structure in Delafield

04/16/2009

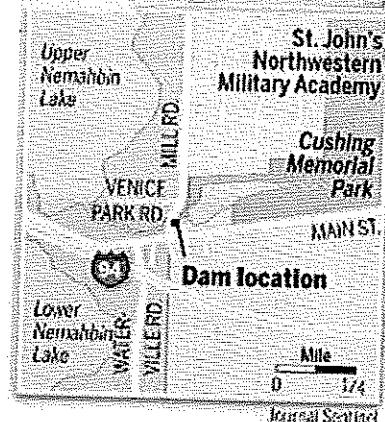
By Scott Williams of the Journal Sentinel

Posted: Apr. 14, 2009

 [enlarge photo](#)

Bark River dam

After maintaining and operating a dam on the Bark River for about 50 years, property owner Margaret Zerwekh hopes to get a judge's approval soon to remove the dam and begin a river restoration project.



Delafield - Residents of a neighborhood on the Bark River could soon learn whether a prolonged squabble over a historic dam will result in maintaining manmade comfort or restoring natural beauty.

At issue is the future of Margaret Zerwekh's privately owned dam, which has captured river water for more than 150 years, creating a large pond in the neighborhood.

Zerwekh is aiming to dismantle the dam and allow the Bark River to flow freely once again. But her neighbors want to preserve the pond, along with their waterfront property values.

Delafield city officials last week narrowly rejected a plan to take over the dam through condemnation, as requested by the neighbors.

That means Zerwekh, who has been working for five years to remove the dam, could begin her transformation of the neighborhood within a matter of weeks.

All that remains unsettled is a ruling from an administrative law judge who is reviewing the matter at the request of the state Department of Natural Resources.

The state agency, which long ago declared the dam unsafe, hopes to see the structure rebuilt or removed before the upcoming rainy season and the potential for new flooding.

"We're anxious to move forward," said Michelle Schneider, a DNR dam safety engineer.

At the DNR's urging, the dam was lowered last summer to relieve flooding, which ended up draining the pond dry - a condition that remains.

Schneider said she believes the administrative law judge will issue a decision soon on whether the DNR should issue Zerwekh a permit to remove the dam.

Zerwekh, 89, whose family has owned the property for about 50 years, said she will move quickly, if permitted, to begin what she describes as a rebirth of the Bark River.

"What's wrong with restoring a nice little river?" she said. "That's going to be a beautiful area."

The Bark River extends west from Nagawicka Lake and - after passing over Zerwekh's dam - continues flowing toward Upper Nemahbin Lake.

Zerwekh's neighbors see the dam owner's plan as a blueprint for destroying a manmade waterway that had become a focal point in the neighborhood, if not the entire city. After a group of seven neighbors took their case to Delafield City Hall, they found strong support for city intervention to rebuild the dam and restore the pond.

Ald. Ron Miskelley said the pond offered a scenic recreational outlet for boating and fishing. Miskelley and other pond backers, however, were outvoted last week when the Common Council considered a plan to seize the dam through condemnation and then borrow \$700,000 to rebuild it. The neighboring homeowners agreed to a new taxing district that would pass the cost to them.

The proposal failed on a 4-3 vote.

Other aldermen thought that the city should not jump into the middle of the issue.

"It's not my dam," said Ald. Erv Sadowski, president of the Common Council. "It's really not my call."

Known as a mill pond dam, the structure was built in the 1830s as part of a system for converting grain into flour. It was later retooled for generating electricity.

To help plan the dam removal, the property owner has enlisted the River Alliance of Wisconsin, a nonprofit group that works to protect rivers from pollution, neglect or obstruction.

Helen Sarakinos, the alliance's director of river restoration, said she expects natural vegetation to begin taking root in the drained pond this year. With help and patience, Sarakinos said, the Bark River will carve out a new channel and become a beautiful, unobstructed river again.

Estimating that the process could take up to five years, Sarakinos voiced sympathy for neighbors who miss the pond.

"It's a big change for people, and it's a very emotional one," she said. "It's going to take some time, that's for sure. But you will always get a river again."



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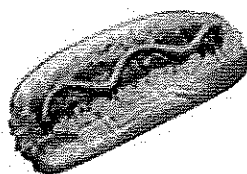
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Editorial

Let the river run

Removing a dam on the Bark River in Delafield is best for the river - and the community.

Posted: Apr. 17, 2009

Supporters of the Estabrook Dam on the Milwaukee River should be a little more nervous after a recent vote in Delafield regarding the rebuilding of a dam on the Bark River. There, the Common Council narrowly voted against seizing the dam and borrowing \$700,000 to rebuild it. It seems that those without a direct stake in the dam were reluctant to spend the money, and in Delafield at least, they're probably right.

"It's not my dam," said Ald. Erv Sadowski, president of the Common Council. "It's really not my call."

This is probably a good thing - for the Bark River, at least.

The 150-year-old mill pond dam, privately owned by Margaret Zerwekh, was long ago declared unsafe by the state Department of Natural Resources. Zerwekh has been working for five years to remove the dam, despite the objections of upstream neighbors who long have enjoyed the pond created by the dam and who were willing to pay for its rebuilding.

While we have some sympathy for those neighbors, it's time for the river to be returned to its natural state. As Zerwekh put it, "What's wrong with restoring a nice little river? That's going to be a beautiful area."

Helen Sarakinos, the River Alliance of Wisconsin's director of river restoration, said she expects natural vegetation to begin taking root in the drained pond this year. With help and patience, Sarakinos said, the Bark River will carve out a new channel and become an unobstructed river again.

The DNR hopes to see the structure rebuilt or removed before the upcoming rainy season and the potential for new flooding. At the DNR's urging, the dam was lowered last summer to relieve flooding, which ended up draining the pond dry - as it remains today.

All that remains unsettled is a ruling from an administrative law judge, who is reviewing the matter at the request of the DNR. We hope that ruling comes soon so that Zerwekh can move forward.

This will be a big change for the neighbors who live on the former pond, and we sympathize with them.

But the best thing for the river in this case is to remove the dam and restore it to its natural state.

They may not have a pond when this is done, but they will have a lovely river in their backyards.



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**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of an Application by Margaret
Zerwekh to Abandon and Remove the Nemahbin
Roller Mill Dam

Case No.: IP-SE-2008-68-67868

and

An Order for Drawdown of the Impoundment
Located on the Bark River in the City of Delafield,
Waukesha County, Wisconsin

Case No.: IP-SE-2008-68-67870

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDERS AND PERMIT

Pursuant to due notice including publication, hearing was held on December 10-11, 2008, at Waukesha, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge, presiding. Pursuant to Wis. Stat. § 31.185(4), the Division deferred action on the request for abandonment for 120 days to allow for any "municipalities or other persons or associations" to acquire ownership of the dam. The 120 day waiting period expired on April 10, 2009, and the Division was not made aware of any such acquisition by any group or entity. The Division formally notified all parties and interested persons that the 120 day period had expired on April 13, 2009. The record closed on April 17, 2009, which was the last date to respond to an ex-parte letter submitted on April 7, 2009.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael Scott
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

Margaret E. Zerwekh
500 Mill Road
Delafield, WI 53018, by

Attorney Steven D. Schmuki
Sayas, Schmuki & Plum, S.C.
11430 West Bluemound Road, #200
Wauwatosa, WI 53226-4050

Upper Nemahbin Lake Management District, by

Tim Mentkowski
34234 Venice Park Road
Delafield, WI 53018

Named petitioners formerly represented by Attorney Paul Kent by,

Raffi Shirikian
740 Mill Road
Delafield, WI 53018

Neil Mooers
257 West Main Street
Delafield, WI 53018

RULING ON MOTION TO DELAY DECISION

At the close of the hearing record, as well as in subsequent correspondence after the hearing from the City of Delafield, there were requests to delay issuance of the decision past the 120 day statutory waiting period. These requests are denied. The four month statutory period provides ample time for a decisive action to be commenced, if not always finalized, with respect to a change of dam ownership or effort to repair and or reconstruct the dam. As of the close of the record in this matter on April 17, 2009, no formal action to change the ownership of the dam has been started, nor is there any indication that such an action is imminent. Further, as set forth below in the Findings of Fact, DNR Dam Safety Engineer Bill Sturtevant was persuasive that concerns about dam owner liability in the event of a further failure argued against any further delay beyond the 120 day statutory waiting period. In addition to reasonable concerns about downstream liability, Sturtevant noted, the dam is very close to Ms. Zerwekh's home. Finally, environmental and water quality concerns argue for getting the project started during the growing season to facilitate re-vegetation. The motion to delay is, accordingly, denied.

FINDINGS OF FACT

1. On October 3, 2004, Margaret E. Zerwekh filed an Application for a Permit to Abandon and Remove the Nemahbin Roller Mill Dam with the Wisconsin Department of Natural Resources (DNR).
2. On June 18, 2008, the DNR issued Findings of Fact, Conclusions of Law and Order for Drawdown of the Impoundment Located on the Bark River in the City of Delafield, Waukesha County, Wisconsin.
3. On June 30, 2008, Raffi Shirikin, Lynne Olson, Gayle Gaborsky, Douglas and Joanne Prittie, Larry and Elizabeth Michels, Michael and Ann Gagliano, Alfred and Susan

Wagner, and Neil and Eileen Mooers filed a Petition for a Contested Case Hearing relating to the drawdown order. On July 16, 2008, the DNR granted the request for hearing.

4. On July 18, 2008, the Upper Nemahbin Lake Management District filed a Request for a Contested Case Hearing relating to the abandonment and removal of the Nemahbin Roller Mill Dam. On August 4, 2008, the DNR granted the request for hearing.

5. On August 7, 2008, the DNR forwarded both matters to the Division of Hearings and Appeals for hearing.

ABANDONMENT ADOPTED FINDINGS

6. The Nemahbin Roller Mill Dam is located on the Bark River in the NW ¼ of the NE ¼ of Section 19, Town 7 North, Range 18 East, in Waukesha County. The dam is approximately 400 feet long and has a structural height of 14 feet.

7. The Bark River is a navigable waterway. It is identified as a “Fish and Aquatic Life Water” of the state in NR 102 Wisconsin Administrative Code and supports a warm water sport fishery.

8. The Nemahbin Roller Mill Dam was originally constructed around 1839. The dam was used to power a sawmill and later a feed and flourmill. The current owner obtained the dam in 1949, began restoring the powerhouse, and by 1980 was using it to produce electricity.

9. On October 3, 2004, the owner of the Nemahbin Roller Mill Dam, Margaret Zerwekh, applied to abandon the dam.

10. The Department conducted sediment sampling within the Nemahbin Roller Mill Dam impoundment on June 14, 2006. The results of the sampling showed that arsenic was present at levels higher than typically found in Southeast Region waterways, but below the Probable Effect Concentration. No other appreciable contaminant levels were identified.

11. On June 3, 2008, the Department of Natural Resources issued a press release announcing the availability of a draft Environmental Assessment on the abandonment and removal of the Nemahbin Roller Mill Dam. The notice stated that written comments should be provided to the Department of Natural Resources by July 3, 2008.

12. During a period of high water, the headrace gate failed on June 11, 2008, rendering the dam’s only low level drain inoperable. The Department issued a safety drawdown on June 18, 2008.

13. The Nemahbin Roller Mill Dam does not meet the design standards in Administrative Code NR 333, Dam Design and Construction Standards, nor does it meet the definition of a compliant dam in NR 116, Wisconsin’s Floodplain Management administrative code.

14. The dam, in its present condition, does not have sufficient spillway capacity, is unsafe, and is a danger to life, health and property.

ADDITIONAL FINDINGS OF FACT

15. The applicant has carried her burden of proof sufficiently to receive the dam abandonment permit, subject to the conditions specified by the DNR and additional conditions that the petitioners have demonstrated are reasonable and necessary to safely abandon the dam.

16. The DNR has carried its burden of proof with respect to the drawdown order.

17. DNR Water Management Specialist Andy Hudak coordinated preparation of an extensive Environmental Analysis (EA) of the proposed abandonment of the Roller Mill Dam. (Ex. 8a) The environmental review concluded that the overall impact of the dam removal would have a positive impact upon the Bark River.

Hudak provided testimony that supported the conclusions of the EA, and specifically opined that dam removal would not have a detrimental impact upon “public rights in navigable waters” within the meaning of § 31.185(5).

Specifically, removal of the dam will reintegrate upstream and downstream fish populations on the Bark River, opening up additional habitat for fish and other aquatic life species that have been blocked by the dam.

Hudak concluded as follows:

“Reductions in sedimentation will cause improvements in the quality of physical habitat and convert the substrate back to its natural condition of a sand and cobble stream bottom. Most benthic invertebrates require this rocky substrate. These invertebrates are an important food source for fish. Many fish species also prefer these rocky bottom conditions for spawning and feeding. Native species and most sport fish exhibit lowered vitality and productivity under the stresses of increased turbidity, lowered water quality, and scarcity of suitable habitat. Other, generalist types of species, such as carp, are unaffected or actually flourish despite these adverse effects and often dominate the fish community in impoundments.

The removal of the Nemahbin Roller Mill dam will improve dissolved oxygen levels and decrease the water temperature in this reach of the Bark River. The removal will also eliminate the artificial warming caused by the impoundment. These effects should have positive impacts on fish and aquatic fish.”

18. Any adverse impacts associated with this project are expected to be short-term in nature. These adverse impacts include turbidity in the waterway, soil disturbance and human activity near the dam site. These adverse impacts will be only those which are unavoidable and occur despite control measures. Unavoidable turbidity effects should not occur during the

spawning period when fish are most vulnerable. There should be no significant impacts in terms of temperature.

Short-term adverse impacts associated with the conversion of the Millpond into a free-flowing stream may affect wildlife which currently use the pond, including ducks, herons, turtles and frogs, muskrats, and raccoon. There are substantial areas of wetland adjacent to the project area along the Bark River that will provide adequate habitat for wildlife displaced from the Millpond during dam removal. The adverse impacts may affect some individuals, but will have no significant long-term impact on the overall numbers, the reproductive capability, or the success and stability of the species or regional populations as a whole.

Long-term effects on the riparian and aquatic system should be highly beneficial. Improvements will occur in physical characteristics, which in turn will create ecological and biological benefits. The Millpond will revert back to a natural sandy-cobble substrate characteristic of the Bark River, providing additional habitat for riverine forms of aquatic life. (Ex. 8a)

To ensure that the transition from short-term adverse impacts to the long term benefits is as smooth as possible, the final plans should include objective standards for re-vegetation over the intermediate period, which will likely be several growing seasons. Some seeding of areas has occurred, but the existing ground cover needs to be enhanced with a final planting plan that emphasizes native plant species that provide habitat value. (Thompson; Montgomery)

19. DNR dam safety engineer Bill Sturtevant testified that he has been involved in more than 50 dam abandonment permits and that the Department has gained insights into sequencing and final construction issues. A slow drawdown allows for consolidation of sediments, gradual re-vegetation, settling of sediments particularly in wetland areas, and floodplain controls. (Sturtevant) Sturtevant testified that the DNR will provide considerable support in downstream monitoring efforts.

20. Sturtevant was persuasive that concerns about dam owner liability in the event of a further failure argued against any further delay beyond the 120 day statutory waiting period. In addition to reasonable concerns about downstream liability, Sturtevant noted, the dam is very close to Ms. Zerwekh's home. Finally, environmental concerns argue for getting the project started during the growing season to facilitate re-vegetation.

21. Removal of the dam will not have a detrimental impact upon wetlands. The wetland area near the site is likely to increase after the Roller Mill dam is fully removed. (Reed) The wetland functional values, particularly for water quality protection and surface water runoff storage and filtering, will also be enhanced. (Reed) Wetland scientist Alice Thompson testified on behalf of dam removal opponents. She expressed concern that there would be a net loss of wetland acreage because the former pond itself was largely a wetland and that it had high functional value for recreational and aesthetic uses. (Ex.224) Further, species dependent upon open water pond habitat would suffer a loss of habitat area. This loss must be balanced with the improved fishery values and improved habitat for fish and mollusks and other invertebrates

discussed below. Finally, Sturtevant opined that wetland areas in other dam removal projects ultimately provided new and enhanced recreational opportunities along the river.

22. The complete removal of the dam will have a positive impact upon fishery values. (Beyler) The drawdown has resulted in some significant short term sediment release. However, the overall impact of the drawdown is likely to be positive over the long-term as the free flowing river allows numerous fish species to pass. Ms. Beyler provided undisputed expert testimony that fish habitat values are likely to improve after dam removal, particularly in the half-mile section near the impoundment. (Id.) Further, dam removal will also improve habitat and opportunities for mussels and other freshwater mollusks, as will the expected improvement in water quality. (Id.) Under controlled conditions, sediment is especially likely to be deposited in quieter and shallower areas and may actually improve habitat values for some species. (Id.)

23. It would be fundamentally unfair to require the applicant to clean up and monitor the entire Bark River below the dam. (Sturtevant) However, the petitioners have demonstrated that there is a significant risk of the proliferation of harmful invasive plant species after dam removal. The Division concludes that the permit should contain a new condition which requires monitoring for invasive species and for sedimentation, limited to on-site areas directly subject to the control of the applicant. (Condition 8)

The DNR testified at hearing that it would reasonably expect to undertake monitoring on off-property areas after full dam removal has been accomplished. It is expected that the City of Delafield will also be kept informed of (and included, with City approval) in some of these efforts in the areas owned by the City, including the riparian area near Cushing Memorial Park that lies at the eastern edge of the former mill pond area.

24. Given the proximity of Upper Nemahbin Lake a short distance downstream, it is important to minimize sediment transport to the extent that is possible. Some sediment release is to be expected and is part of the natural process of a riverine system. However, all care should be taken to avoid a massive release of sediment that would have a detrimental impact upon Upper Nemahbin Lake water quality.

25. This order is to allow abandonment of the dam. Given the expense of drafting detailed plans, the DNR does not require final dam removal plans until a decision has been made on whether or not the dam can be abandoned. (Sturtevant) Preliminary engineering design plans for the removal of the dam have been prepared by Interflure, Inc., a well known river restoration design firm. (Ex. 111)

26. The final dam removal plans shall address in detail all of the following and shall be subject to approval by Department staff:

- Drawdown Plan
- Material Removal Plan
- Erosion Control Plan
- Sediment Stabilization Plan

- Planting Plan
- Floodplain Analysis
- Stream bank Stabilization Plan
- Existing and Proposed Grades
- Construction and Post-Construction Sequencing
- Site specific analysis
- On-site post-construction monitoring, including but not limited to : invasive species control, objective re-vegetation standards, sedimentation stabilization and other physical or biological conditions requested by Department staff (Id; Exs. 8a and Ex. 222; Hudak; Sturtevant; Montgomery)

DISCUSSION

There is no question that the loss of the Nemahbin Pond will be difficult for the petitioners who have organized to oppose the dam abandonment. They spoke eloquently and with conviction about how their families and friends have enjoyed the pond for many years, as well as of their sincere desire to contribute financially to reconstruction of the dam if the applicant chose to pursue it. However, Ms. Zerwekh, for very sound reasons of her own, has not chosen to do so. Instead, she has maintained her right to pursue abandonment of the dam which she and her late husband have heroically maintained for nearly sixty years. After all of those years, Ms. Zerwekh is understandably tired of the responsibility of maintaining the dam and of protecting her assets against its potential liabilities.

Ms. Zerwekh is also looking forward to restoring the river to its natural state. But her reasons for pursuing abandonment are not really at issue in this case. The only issue is whether or not the abandonment meets state standards for doing so. Ms. Zerwekh has established that it does, so long as it is undertaken in accordance with the conditions described below.

The experts for the opponents raised reasonable concerns about the release of accumulated sediment, the impact on wetlands and the ability of the applicant to bear the high cost of doing the dam removal in an environmentally responsible manner. There is no question that some sediment will be released during final dam removal. It is expected that the final plans will minimize any short-term detrimental impact upon water quality in downstream areas.

However, the great weight of the evidence was that the long-term effects of dam removal on public rights in the riparian and aquatic system should be highly beneficial. Given the likely long term benefits of dam removal, the balancing of public rights in public waters clearly supports issuance of the permit to abandon the dam. Further, Ms. Zerwekh has operated the dam in a highly responsible way that benefited the public interest for many years. There is every reason to expect that she will undertake the dam removal in the same manner.

Based upon the record made at the hearing, the Division has added three new conditions to the original DNR permit. First, a requirement for the dam owner to monitor her 15-acre parcel to protect against introduction of invasive species, to control sediment release, and to monitor any other physical or biological condition deemed a concern by DNR staff. (Sturtevant) Second,

a specific requirement for a new planting plan which includes objective performance standards (i.e. targeted percentage of cover) and which emphasizes native species with habitat value. (Thompson & Montgomery) Finally the final permit contains a requirement for construction (Hudak) and post-construction (Montgomery) sequencing and final plans.

While it is outside the scope of this review of the draw down order and dam abandonment permit, it is hoped that the parties and interested entities, including if necessary the City of Delafield, will work cooperatively to resolve any issues related to preserving or establishing riparian rights for the properties along the former Mill Pond. To the extent practicable, the final plans should make every effort to maintain existing riparian Bark River access for the affected properties.

The conditions set forth below are reasonable and necessary to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43 and 31.185 to hear contested case relating to permits to abandon dams and cases relating to drawdown orders pursuant to Wis. Stat. § 31.19(5).

2. Wisconsin Stat. § 31.185(4):

Prior to the hearing the department shall have its staff make its own investigation of the dam and, on the basis of such investigation, shall make recommendations as to the type of requirements, if any, which it would impose on the applicant under sub. (5) as a condition to granting the permit. Such recommendations shall be presented at the hearing. If no one registers opposition to the application at the hearing, the department shall grant the permit, subject to such conditions as it deems necessary under sub. (5). If someone registers opposition to the abandonment at the hearing and such opposition is not withdrawn, the department shall defer action on the application for a period of 120 days after the hearing. Within a reasonable time after the expiration of such period, the department shall deny the permit, or grant the permit, subject to such conditions as it imposes under sub. (5), unless, within such 120-day period, one or more municipalities or other persons or associations have agreed to acquire ownership of the dam and have furnished satisfactory proof of intent to comply with s. 31.14 (2) or (3).

The 120 day waiting period has run as of April 10, 2009. No municipalities or other persons or associations have agreed to acquire ownership of the dam.

3. As a prerequisite to the granting of a permit under this section, the department may require the applicant to comply with such conditions as it deems reasonably necessary in the particular case to preserve public rights in navigable waters, to promote safety, and to protect life, health and property. Wisconsin Stat. § 31.185(5)

The conditions set forth below are necessary to accomplish the objectives described above.

4. A dam abandonment is a Type 2 action pursuant to NR 150.03(f)(7)(a). The DNR prepared an Environmental Assessment (Ex. 8) and has complied with the procedural requirements of WEPA in this matter.

ORDERS

WHEREFORE, IT IS HEREBY ORDERED, that the dam be declared abandoned, and that the removal of the dam be permitted to the owner specified above;

IT IS FURTHER ORDERED, that the owner of the Nemahbin Roller Mill Dam must develop final plans and specifications for the removal of the dam subject to the permit conditions specified below and approval by DNR staff:

CONDITIONS

1. The dam must remain in a drawn down condition until plans for the removal have been approved.

2. The owner will obtain the services of a Professional Engineer (PE) registered in the State of Wisconsin to develop the required plans and specifications for the removal of the dam and restoration of the Bark River.

3. The plan must be submitted within six months of the date of this order.

4. The plan must include best management practices and techniques to remove or stabilize existing sediment deposits and control transportation of material to the maximum extent practicable.

5. Construction site erosion control technical standards and best management practices must be followed.

6. The plans must include the complete removal of all concrete, metal and wood portions of the dam and the removal of portions of the earthen embankment to the extent necessary to pass the regulatory flood.

7. Demolished dam materials must be disposed of properly.

8. On-site monitoring plans for invasive species, control of sediments and any other physical or biological conditions requested by DNR staff.

9. A planting plan that emphasizes native species with habitat value and that includes objective standards of re-vegetation performance.

10. Construction and post-construction sequencing and final plans.

Dated at Madison, Wisconsin on April 21, 2009.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____

Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.

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Appeal to Zerwekh dam ruling possible

Nemahbin lakes officials concerned about silt

By KELLY SMITH

Posted: Apr. 27, 2009

City of Delafield – The president of the Upper Nemahbin Lake Management District says there is "definitely a consideration" to appeal an administrative law judge's order last week allowing the removal of Margaret Zerwekh's privately owned dam along the Bark River on the city's west side.

District President Tim Mentkowski said lawyers are reviewing the 11-page order issued last week by Administrative Law Judge Jeffrey D. Boldt.

The order describes the conditions that must be met in order for the Wisconsin Department of Natural Resources (DNR) to issue a permit to Zerwekh to remove the more than 150-year-old dam structure and earthen dike on the Bark River near the corner of Mill Road and Main Street.

Mentkowski said two issues concern district officials: whether the district is still considered a legal party in the proceedings and whether the DNR is required to approve a plan that addresses how sediment on the bottom of the former dam millpond and along the Bark River will be controlled when the dam is removed.

The millpond was drained last summer on orders from the DNR because of concerns over the dam's stability after it was damaged during torrential rains and flooding.

Lake District officials are concerned that 50,000 cubic yards of silt will flow from the former millpond into the Nemahbin lakes after the dam is removed. The district has been working with the Southeastern Wisconsin Regional Planning Commission (SEWRPC) to develop a plan to control the sediment.

Mentkowski said Zerwekh's engineering consultant, Inter-Fluve Inc., has been working on a sediment-control plan similar to one being developed by SEWRPC.



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"But there does not appear to be anything in the order that requires DNR to have any plan for removing the silt. An appeal is definitely a consideration," Mentkowski said..

The district may appeal the order to the secretary of the DNR or seek a judicial review, provided the district is still a party in the dispute.

The district and eight homeowners living along the dam millpond requested the hearing conducted by Boldt. However, the district withdrew its request before the two-day hearing was conducted in December.

Meanwhile, Helen Sarakinos, a river restoration expert with the River Alliance of Wisconsin, said the lake management district's concerns are addressed in the order.

She pointed out that the order requires a registered professional engineer to develop a plan for removing the dam and restoring the river, and the plan must "include best management practices and techniques" for stabilizing the sediment.

Sarakinos has spoken briefly to city officials about the possibility of extending the Wisconsin Veteran's Memorial Riverwalk into a scenic river parkway that might be developed as part of the river restoration.

She has said the river alliance might be able to assist Zerwekh, and the city is seeking funds to pay for the restoration.

However, she said Friday that the Zerwekh's first priority must be developing the dam abandonment plan that must be submitted to the DNR within six months.

Sarakinos said Inter Flueve has experience working on controversial dam abandonment projects.

Sarakinos advocated that the state, lake management district, neighbors and Zerwekh's consultants should remain in communication with each other.

Sarakinos said the river alliance would determine what role it would play in securing funds for the project after talking with Zerwekh about what resources she needed.

Zerwekh had no comment, as she had not read Boldt's decision.

CITY OF DELAFIELD COMMON COUNCIL MEETING MINUTES

period/informational meeting for Delafield on June 1, 2009 at 7 p.m. The other communities will have their meeting on June 3 and 8.

5. Old Business

a. LOMR Update.

No report.

b. Discussion and Action to Adopt Resolution No. 2009-11, A Resolution Authorizing, Creating And Establishing The Roller Mill Lake District.

Discussion took place on the Resolution presented tonight versus an earlier version. G. MacDougall stated that the purpose of creating a Lake District is to give the people who live on the pond a platform so that their voice will be heard. This resolution does not ask anything from the City but only asks for a creation of a lake district. As it stands now, when the reclamation of the river occurs, the City has no standing. If a lake district is created for the Roller Mill area, they will have a say in the reclamation. Without it, the DNR and Wisconsin River Alliance will come in and do whatever they want. Any expense with reclamation of the river would be borne by the Lake District (residents of the pond). In the event that M. Zerwekh wanted to rescind the permit to take out the dam, the Lake District, not the City, would fund the money to rebuild the dam to the standards required. Basically there is no liability for the City; all this does is give the people on the pond a platform to make sure the area becomes a nice area. The new resolution gives residents of the pond the ability to be heard and have a say in how the pond will be reclaimed. G. MacDougall again stressed that if the Lake District is created, the pond residents will have a stand, no City funds are involved, and all funds will come from the Lake District.

All of the pond properties have been reassessed – there is a loss of over \$1 million. The Lake District will get their funds by assessing the residents within the Lake District. The District has been made smaller so as to not include those properties that did not want to be included.

J. Krickhahn asked how the Lake District would pay for any work. G. MacDougall stated that they would assess their members. It would be done on a majority rules basis for an assessment. Mayor McAleer asked Attorney Hammes to look at this so that it was being created for river reclamation and not for any other purpose. J. Krickhahn asked about the people who did not want to be part of the Lake District. It was clarified that they were not in the District. Mayor McAleer stated that according to the memo from the Attorney, the City needed clear delineation of property lines, etc. He did not feel that this was available at this time. He only wanted discussion on this item and to carry it over to another meeting.

M. DeYoe asked what the difference was between creating a non-profit group and a Lake District. Would this give them less of a standing than a Lake District? G. MacDougall explained that a Lake District is defined by the DNR and they would qualify as an entity under the DNR rules. A lake district cannot be ignored by the DNR.

It was clarified that the boundaries of the Lake District are defined by tax key numbers.

The City would not be a part of the Lake District, but the Lake District would be within City limits. He would like the homeowners to look into the two corporations to see if either one would fit their needs, to form it on their own, and not involve the City with the formation. He requested that this be looked into in addition to something in writing from the DNR stating that the only thing they would respect would be a lake district. G. MacDougall stated that all had been answered and is part of the law. The only type of organization that would be recognized, and the only way a lake district can be created is through the Common Council. There is no liability

CITY OF DELAFIELD COMMON COUNCIL MEETING MINUTES

to the City. The Lake District is designed to give the group a platform as to how this area is handled. If a lake district is created, the neighbors would have a say. The only way the people can be heard is to create a lake district.

B. Leonard stated that the Lake District as shown includes M. Zerwekh's property and the property owned by the Mooers. She asked if these property owners had been contacted regarding the Lake District and if they had been consulted. Mayor McAleer stated that he spoke to M. Zerwekh. If there are questions that need to be answered by the attorney, they should be presented and discussed at the next meeting. He felt that the intent was to restore the river and he did not understand the urgency to act. G. MacDougall stated if a Lake District was not created; the DNR and Wisconsin River Alliance would make the decision. He felt that if there was no cost to the City, nor any liability, that there should be a lake district. J. Krickhahn stated that this was a compromise, but was uncomfortable including M. Zerwekh's property when she didn't want to have anything to do with it. He asked if there was a way not to include Zerwekh and the other property, but to include Mooers.

The attorney for M. Zerwekh stated that he recently had a brief conversation with her. She made comments to him that she is not interested in being the Lake District nor does she see the need for the District as all property owners have every opportunity to weigh in with the DNR. The DNR is the organization body that controls the requirements made of M. Zerwekh in pursuing her now granted permit to abandon and remove the dam. During the DNR's walk around with the ALJ, he heard that anyone could weigh in, speak their concerns, give input on what they would like to see happen, and be informed as to what would occur. M. Zerwekh's position was that there would be ample opportunity for people to weigh in. M. Zerwekh was perplexed at the resolution as to how a lake district could be created on a nonexistent lake. For all intents and purposes there is no longer a lake there. He was not sure as the statutes were unclear to him as to whether a dry lake bed could become a lake district. G. MacDougall stated that according to the DNR statutes, the only organization they will recognize is a lake district. In regards to how there can be a lake district, there would be a lake if the stop logs were put back. M. Zerwekh's attorney stated that there was no water. M. Zerwekh's efforts have been successful and she was granted the right to abandon and remove the dam. He noted that the City assessor has re-assessed these properties on the presumption that the water would be absent. He felt that the City itself agreed that there was no lake. It was appropriate to give M. Zerwekh additional time to be heard. He asked that if tonight is the night to make the decision, M. Zerwekh be removed from the Lake District. It was clarified that the appeal process is open until May 22nd. However, the right to appeal to Circuit Court is still available; the right to request a re-hearing with the Department has closed (that was a 20 day). Discussion took place as to whether there was a movement to attempt to create a historic district on the pond floor. T. Schuenke stated that he did not know anything about a historical district, but he did receive a call from the State Archeologist stating that if anyone was seen there searching for artifacts he should give them a call.

T. Aicher commented that a lake district could offer more than a voice and could be a tool as opposed to a group of banded citizens. He felt that it was worth exploring whether M. Zerwekh's interest and the rest of the group could be advanced together. He would like to see the benefit of a lake district. He felt there was a way to lock arms.

Raffi Shirikian, 740 Mill Road commented on M. Zerwekh's attorney's comments. He stated that it is a lake. Assessments as of January 1 were based on property conditions. He displayed before and after photos. The Lake District would be a tool to fix it to compensate for what it was. Mayor McAleer stated that if there is a way to lock arms to make sure that restoration is done right, he would like to see a vehicle established to do that. R. Shirikian stated that a lake district is the way to do this. They now have adverse conditions there that need to be

CITY OF DELAFIELD COMMON COUNCIL MEETING MINUTES

addressed. The District would be the tool to be heard. They want the opportunity to go back and fix it.

J. Krickhahn asked that something be put together showing M. Zerwekh's property not in the Lake District. Mayor McAleer stated that the Common Council would not vote to do this if M. Zerwekh's property was included. Her attorney stated that M. Zerwekh's goal is not far removed from other upstream owners – they want to see a river that will benefit everyone. She wants it to look great to boost values and be something that everyone will be happy with it. B. Leonard felt like people were taking sides versus taking care of the problem. She would like to see that everyone has the same vision for restoring this area. She did not see this happening with a lake district. Mayor McAleer stated that it was the City Attorney's opinion at staff level that the impoundment still existed and it was a lake, however the law is ambiguous and unclear as to whether it is a lake or not. R. Shirikian stated that M. Zerwekh wants to see the river restored, but the money is a factor. Who will pay for what needs to be done there to recover \$1 million in property loss? They want to see a nice river, but it will take money to get it done. G. MacDougall stated that the money would come from the Lake District residents. R. Shirikian stated that right now the plan is to wait until the sediment vegetates and then rip out the dam. There is no restoration plan. The River Alliance wants to put up a boardwalk on the south side of the plan.

M. Zerwekh's attorney responded that R. Shirikian is technically correct in that right now there is no specific plan for restoration. The rest of the planning is yet to be done and is part of the permit to be imposed on M. Zerwekh included in restoration. It has not been completed yet because the City of Delafield entertained a resolution sometime along the way to condemn her property. Now the plans will be forthcoming. He believed that she and the Department and the upstream people will be able to review it. L. Morrison stated that when the dam was removed on North Lake, there was no restoration and she agreed with R. Shirikian. Mayor McAleer asked if the City Plan Commission would have input in this. L. Morrison thought the DNR supersedes the City. R. Shirikian stated a conceptual plan is an idea, the details of this is where the money is spent. If there was restoration, there would have been an image. The mechanics of this plan are time consuming. It was suggested to call the DNR and ask them to present their plan. R. Shirikian stated that the actions of the DNR were to wait until the area was vegetated and then rip out the dam. J. Krickhahn stated that the DNR should have a representative present at a future meeting.

J. KRICKHAHN MOTIONED TO POSTPONE RESOLUTION NO. 2009-11, A RESOLUTION AUTHORIZING, CREATING AND ESTABLISHING THE ROLLER MILL LAKE DISTRICT. B. LEONARD SECONDED THE MOTION. THERE WAS NO FURTHER DISCUSSION. ALL WERE IN FAVOR. MOTION CARRIED.

- c. Discussion of Neighborhood Electric Vehicle (NEV) Ordinance and Memo from Police Chief Taubel of the Same.

J. Krickhahn thanked Chief Taubel for checking into this. He would like to pursue this to see if Waukesha County could include Highway C in the Ordinance. This would then link the two sides together and exclude Highway 83. These are electric powered, two person vehicles. In the City of Oconomowoc, the DPW owns a vehicle that made their ordinance necessary. L. Morrison stated that the last sentence of Chief Taubel's memo should read "I do not believe there are any other roadways with the speed limit of 35 mph or more that lie within the city and are of a joint jurisdiction." These electric vehicles look very similar to golf carts. This will be put on the next agenda.

A five minute recess was taken. Meeting reconvened at 8:52 p.m.

CITY OF DELAFIELD COMMON COUNCIL MEETING MINUTES

6. Mayor's Report

- a. Discussion and Action to Accept the Resignation of Gerry Maier from the Board of Zoning Appeals.

E. SADOWSKI MOTIONED TO ACCEPT THE RESIGNATION OF GERRY MAIER FROM THE BOARD OF ZONING APPEALS. M. DEYOE SECONDED THE MOTION. THERE WAS NO FURTHER DISCUSSION. SIX WERE IN FAVOR. L. MORRISON OPPOSED. MOTION CARRIED.

- b. Discussion and Action to Appoint Gerry Holton to the Board of Zoning Appeals to Fill Gerry Maier's Term until April 2010.

E. SADOWSKI MOTIONED TO APPOINT GERRY HOLTON TO THE BOARD OF ZONING APPEALS TO FILL GERRY MAIER'S TERM UNTIL APRIL 2010. M. DEYOE SECONDED THE MOTION. THERE WAS NO FURTHER DISCUSSION. ALL WERE IN FAVOR. MOTION CARRIED.

- c. National Safe Boating Week Proclamation.

Mayor McAleer read the National Safe Boating Week Proclamation.

7. New Business

- A. Discussion and Action to Award the Downtown Directional Signs RFP to Triad Creative Group.

E. SADOWSKI MOVED TO APPROVE THE AWARDING OF THE DOWNTOWN DIRECTIONAL SIGNS RFP TO TRIAD CREATIVE GROUP. B. LEONARD SECONDED THE MOTION. IN RESPONSE TO A QUESTION BY B. LEONARD, R. DUPLER CLARIFIED THAT THE BUSINESSES WOULD PAY \$100 WHICH WOULD OFFSET THE FEE TO MANUFACTURE THEIR SIGN. THIS WOULD BE CONDUCTED THROUGH AN ANNUAL LOTTERY TAKING PLACE EVERY MARCH. THE SIGNS WOULD BE BANDED TO THE LIGHT POLES AND COULD EASILY BE TAKEN OFF. HE EXPLAINED THAT THE INTENT WAS THAT WHEN YOU ARE HEADING NORTH INTO THE CITY ON HIGHWAY C, THE LIGHT POLES THAT YOU ENCOUNTER AS YOU APPROACH BOTH WELLS, MAIN, AND MILWAUKEE STREETS WOULD BE RIGHT TURN DIRECTIONALS FOR ALL OF THE BUSINESSES TO THE EAST SIDE. TRAVERSELY AS YOU ARE COMING FROM THE NORTH, THEN ANYTHING WEST WOULD BE THE RIGHT TURN. THERE WOULD BE SIX DIFFERENT LOTTERIES. ALL WERE IN FAVOR. MOTION CARRIED.

- B. Discussion and Action to Adopt Ordinance 611, Ordinance Creating Section 17.736 of the Municipal Code of the City Of Delafield Regulating Downtown Directional Signs.

E. SADOWSKI MOTIONED TO ADOPT ORDINANCE 611, ORDINANCE CREATING SECTION 17.736 OF THE MUNICIPAL CODE OF THE CITY OF DELAFIELD REGULATING DOWNTOWN DIRECTIONAL SIGNS. J. KRICKHAHN SECONDED THE MOTION. L. MORRISON ASKED IF THIS ORDINANCE RELATED TO WHAT THE SIGN COMMITTEE DID; IT WAS CLARIFIED THAT IT WAS. ALL WERE IN FAVOR. MOTION CARRIED.

- C. Discussion and Action on Temporary Signage Infractions.

B. Leonard stated that some temporary signs came down at some intersections, but not at others. R. Dupler stated they are policing the temporary signage. If the signs are from a

Delafield citizens sue DNR over dam removal

Suit seeks to reverse department's decision

By Emily Bultman and Caley Clinton
Freeman Staff

DELAFIELD – Thirteen city residents filed suit against the state Department of Natural Resources this week in an effort to reverse the DNR's decision to remove the 170-year-old Nemahbin Roller Mill Dam.

Debate over what to do about the decaying dam has raged on for years in the city, and was further agitated last summer when flooding prompted the DNR to order a drawdown of the 12-acre Millpond created as a result of the dam. The petitioners' properties abut the Millpond, and they claim it "contributes substantially to the financial value" of their properties, according to the suit filed in Waukesha County Circuit Court.

The dam is on resident Margaret Zerwekh's property. She has tried for years to find a solution to its state of disrepair. She claims she cannot afford to fix the dam and has petitioned the DNR for its removal.

If the dam is removed, as granted by the DNR on April 21, the Millpond would first be drawn down and then the dam structure would be removed.

The residents who filed suit – Gayle Gaborsky, Raffi Shirikin, Lynne Olson, Douglas and Joanne Prittie, Larry and Elizabeth Michels, Michael and Ann Gagliano, Alfred and Susan Wagner and Neil and Eileen Mooers – claim the Millpond "provides ongoing benefits to the petitioners and the public," including: recreational values due to boating in the summer and skating in the winter, scenic and aesthetic values and wildlife habitat values, according to the suit.

Hearing the news that her neighbors had filed a civil action, Zerwekh said it was too little too late.

"This is another roadblock to stop me from removing my dam and restoring the river. They want to get involved in the process. I am trying to figure out with my lawyer a way for this to be possible," she said. "I understand they have concerns because they live along the river, but we need to work together on this."

Representatives with the nonprofit organization River Alliance of Wisconsin, and engineers from the Madison-based environmental engineering firm Inter-Fluve Inc., were invited to Zerwekh's property Wednesday to discuss the next step.

"I have been waiting to do this project for a long time and I received permission to do it," she said. "I expect work will start this summer if everything goes as planned."

Zerwekh's neighbors, Elizabeth and Larry Michels, refused to comment on the suit they are a part of against the state. Calls to the other parties were not returned Wednesday evening.

Mayor Ed McAleer said he was disappointed to hear the suit had been filed. The Tuesday filing came one day after the Delafield Common Council heard a proposed plan to create a special lake management district in order to give those same residents a voice in the dam removal and Bark River restoration.

"Filing a lawsuit is not the solution to this problem. It is going to push everything back and keep plans from happening," McAleer said. "This could take months or even years to resolve in court."

He noted the council agreed Monday to gather more information before approving the lake district at its next meeting. However, this recent development might delay its creation.

"I was in favor of the district initially, but now I am not so sure. Everyone needs to get back on the same page," McAleer said.

In addition to a reversal of the DNR's approval of the dam removal, the suit also seeks "further relief as may be necessary or appropriate to rectify the (alleged) illegal actions of the department."

E-mail: ,

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 1

WAUKESHA COUNTY

GAYLE GABORSKY,
RAFFI SHIRIKIN and LYNNE OLSON,
DOUGLAS and JOANNE PRITTIE,
LARRY and ELIZABETH MICHELS,
MICHAEL and ANN GAGLIANO,
ALFRED and SUSAN WAGNER,
NEIL and EILEEN MOOERS,

Petitioners,

vs.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

Case No. 09-CV-1964

Administrative Agency Review: 30607

STIPULATION AND ORDER FOR DISMISSAL

WHEREAS on April 22, 2009, the Wisconsin Department of Natural Resources issued Findings of Fact, Conclusions of Law, Orders and Permit ("Permit") in two matters captioned, *In Matter of an Application by Margaret Zerwekh to Abandon and Remove the Nemahbin Roller Mill Dam*, Case No. 626S70808E688; and *An Order for Drawdown of the Impoundment Located on the Bark River in the City of Delafield, Waukesha County, Wisconsin*, Case No. 621S670P8E8780, which proceedings are the subject of the above-captioned petition for judicial review.


WHEREAS the Permit provides in part that "the owner of the Nemahbin Roller Mill Dam [Ms. Zerwekh] must develop final plans and specifications for the removal of the dam subject to the permit conditions specified below and approval by DNR staff." Such plans and specifications are currently in the process of being prepared.

IT IS HEREBY STIPULATED AND AGREED by and between the parties, by their
respective attorneys, as follows:

1. The DNR agrees to provide Petitioners' counsel, a copy of the proposed plans and specifications submitted by the owner of the dam, and to allow the Petitioners a reasonable time for review and comment.
2. The DNR agrees to promptly notify the Petitioners when it has approved the plans and specifications.
3. In consideration of the foregoing, an Order maybe entered without further or other notice providing for the dismissal of the above-entitled action, without prejudice and without costs to any party.

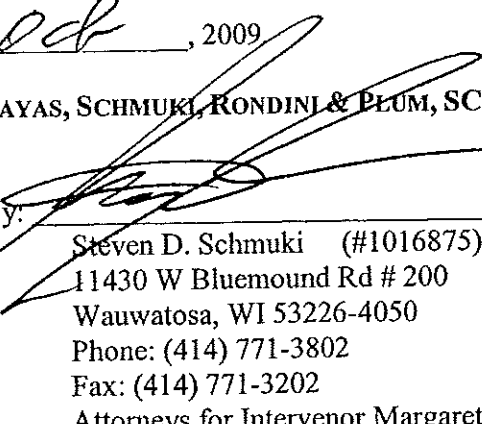
DATED this 19th day of October, 2009.

ANDERSON & KENT, S.C.

By: 
Paul G. Kent (#1002924)
1 N. Pinckney Street, Suite 200
Madison, WI 53703
(608) 246-8500
Attorneys for Petitioners

DATED this 21st day of Oct, 2009

SAYAS, SCHMUKI, RONDINI & PLUM, SC

By: 
Steven D. Schmuki (#1016875)
11430 W Bluemound Rd # 200
Wauwatosa, WI 53226-4050
Phone: (414) 771-3802
Fax: (414) 771-3202
Attorneys for Intervenor Margaret Zerwekh

DATED this 20th day of October, 2009.

J.B.VAN HOLLEN, ATTORNEY GENERAL

By: Lorraine C. Stoltzfus
Lorraine C. Stoltzfus (#1003676)
Wisconsin Department of Justice
P.O. Box 7857
Madison Wisconsin 53787-5077
Phone: (608) 246-8500
Fax: 608-222-6570
E-mail: stoltzfuslc@doj.state.wi.us
Attorneys for Respondent Wisconsin Department of
Natural Resources

ORDER FOR DISMISSAL

09-CV-1964

Based upon the foregoing Stipulation, and on the record and file herein, and the Court

being duly advised in the premises,

IT IS HEREBY ORDERED that the above-entitled action be and the same is hereby dismissed without prejudice and without costs to any party.

DATED at Waukesha, Wisconsin, this 28 day of October, 2009.

for /s/ Ralph M. Ramirez
Michael O. Bohren, Circuit Court Judge
Waukesha County Circuit Court

FILED
IN CIRCUIT COURT

OCT 28 2009

WAUKESHA CO. WI
CIVIL DIVISION

Rose/deJong

November 19, 2009

Via Facsimile and US Mail
262-574-2117

Michelle Schneider
Water Regulations and Zoning Engineer
Wisconsin DNR
141 NW Barstow Street, Rm 180
Waukesha, WI 53188

Re: Margaret Zerwekh/Nemahbin Roller Mill Dam

Dear Ms. Schneider:

I am writing on behalf of my respective clients who own property adjacent to the Mill Pond in the vicinity of the Nemahbin Roller Mill Dam to determine the status of the Removal and Restoration Plan that is required of Margaret Zerwekh pursuant to the removal permit and subsequent Administrative Law Judge decision dated April 21, 2009.

As you know, I represent a group of concerned property owners who own property in the vicinity of the Nemahbin Roller Mill Dam.

For the past few months, I have worked diligently to acquire as much information as possible about the proposed removal, restoration requirements and sediment removal and sediment control, inter alia.

My goal, of course, is to best protect the rights of my clients relative to the proposed dam removal. Please note that my clients respectfully reserve the right to assert that the best course of action is to rebuild the dam.

With that said, I respectfully submit that the following items must be made part of the removal and restoration plan:

- (1) A registered professional engineer is to develop the required plans and the specifications for the removal of the dam and restoration of the Bark River.
- (2) The Removal and Restoration Plan is now past due. My calculations show that it was due on October 21, 2009.

ATTORNEYS AT LAW

161 South First Street, Suite 400
Milwaukee, WI 53204

Phone 414.274.1400 / Fax 414.274.1401

www.rosedejong.com

November 19, 2009

Via Facsimile and US Mail

Michelle Schneider

Page 2

- (3) The Removal and Restoration Plan, according to the Administrative Law Judge, was to include the "best management practices and techniques for the removal or stabilization of the existing sediment deposits." Furthermore, the Removal and Restoration Plan must include provisions for the control of the transportation of material to the maximum extent practicable. As you know, the treatment in the plan regarding sediment and contaminated sediment is of crucial importance.
- (4) There must be construction site erosion control.
- (5) The Administrative Law Judge concluded that all concrete, metal and wood portions of the dam are to be removed and, to some extent, portions of the earthen embankment are also to be removed. The details for such removal are important and should be set forth with precision in the Removal and Restoration Plan.
- (6) There must be on-site monitoring plans for invasive species, control of sediments and any other physical or biological conditions requested by DNR staff. To date, I am uncertain as to whether DNR staff has requested any conditions of this variety. In reviewing the reports and studies performed relating to the Mill Pond and the Bark River, it is apparent that significant conditions should be imposed for this project. In particular, the existence of contaminants including, but not limited to, arsenic, metals, sludge and mercury certainly must be addressed by the Removal and Restoration Plan. The information in my possession, based upon DNR studies (among others) indicates that the sediment is contaminated to a point where it presents an actual health risk to my clients and to the community at large.
- (7) Planting Plan.

The foregoing constitutes a preliminary list of concerns based upon information currently in my possession and my review of the Administrative Law Judge Decision dated April 21, 2009. My clients and I respectfully reserve the right to supplement this list of concerns as further information is discovered throughout the course of our ongoing investigation of Lake Nagawicka, the Bark River, the Mill Pond and Upper Nemahbin Lake.

100-106789-1
ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 01-01-2001 BY 60322 UCBAW

100-106789-1

November 19, 2009

Via Facsimile and US Mail

Michelle Schneider

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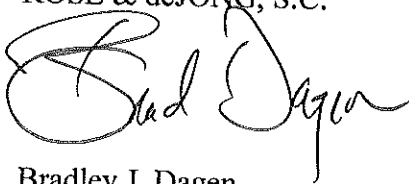
As you certainly know, the concerns I have raised in this letter are significant and, clearly, should be included as matters that are addressed in the proposed Removal and Restoration Plan. Due to the urgency of this matter, and the potential for serious health and safety hazards and financial loss, I would ask that you give this matter your prompt and careful attention.

I would also ask that any proposed removal and restoration plans that are submitted by Margaret Zerwekh or on behalf of Margaret Zerwekh are immediately forwarded to my office for review with our clients so that we may actively participate in the process. We are advocating for a removal and restoration plan that works for the benefit of all private property owners affected by this matter, the surrounding community and the general public.

Thank you for your time and attention to this important matter.

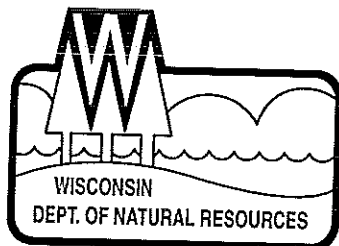
Very truly yours,

ROSE & deJONG, S.C.

A handwritten signature in black ink, appearing to read "Brad Dagen", written over a horizontal line.

Bradley J. Dagen
BJD\pdm

cc: Clients
Steven D. Schmuki, Esq. (via fax and US mail)



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor
Matthew J. Frank, Secretary
Gloria L. McCutcheon, Regional Director

Waukesha Service Center
141 NW Barstow St. Room 180
Waukesha, Wisconsin 53188
Telephone 262-574-2100
FAX 262-574-2117
TTY Access via relay - 711

November 23, 2009

Bradley Dagen
161 South First Street, Suite 400
Milwaukee, WI 53204

Dear Mr. Dagen:

Thank you for your November 19, 2009 letter regarding the Nemahbin Roller Mill Dam in Waukesha County. You expressed concerns that the removal and restoration plan for the dam incorporate a list of items outlined in your letter. The Department of Natural Resources (Department) has reviewed the scope of work for preparing the proposed dam removal plans. We believe the scope is adequate to address the majority of questions and concerns identified in your letter.

It is the Department's understanding that the plans are currently being developed and should be submitted for review in the near future. Department staff will review the removal and restoration plans to ensure they meet State standards. Once the Department receives the plans, they will be available for review by the public. You will have the opportunity to have copies made for you and your clients.

Thank you again for contacting us to express your concerns. If you have any further questions regarding this project please feel free to contact me at 262-574-2127.

Sincerely,

Michelle Schneider, P.E.
Water Management Engineer
Wisconsin DNR, Southeast Region

